(1)

Supreme Court, U.S.
FILED

No. 01164 9 MAY - 8 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JOE LANDRUM,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Mississippi

---

PETITION FOR A WRIT OF CERTIORARI

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

MICHAEL B. WALLACE
PHELPS DUNBAR, L.L.P.
200 S. Lamar Street
Suite 500, Skytel Centre
Jackson, MS 39225

Counsel for Petitioner

Of counsel:

STEPHEN A. BOKAT
General Counsel
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, DC 20062

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

235 pp

QUESTIONS PRESENTED

A Mississippi chancery court issued a summary order forbidding petitioner from broadcasting paid advertisements concerning an impending state election that used the name of the Respondent candidate. After the Mississippi Supreme Court denied a motion to dismiss the appeal for lack of a final and appealable order, the en banc court held that Petitioner's request that this Court grant an emergency stay of the prior restraint waived Petitioner's state right to appeal. In these circumstances:

1. Did the Chancery Court's summary order against future political speech violate the First and Fourteenth Amendments to the United States Constitution?

2. Did the Mississippi Supreme Court's ruling penalizing Petitioner's exercise of its federal right to petition this Court by curtailing Petitioner's state appellate rights violate the Supremacy Clause of, and the Fourteenth Amendment to, the United States Constitution?

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America was incorporated in the District of Columbia in 1916. It is a non-profit, non-stock corporation, exempt from taxation under I.R.C. § 501(c)(6).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	viii
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
The Petition Is Timely	2
The Petition Is Not Moot	2
The Petition Challenges A Final Ruling	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
Prior Restraints Of Chamber Political Speech	5
Stays By This Court And More State Restraints	8
The Mississippi Supreme Court's Appeal-Rights Waiver Ruling	10
REASONS FOR GRANTING THE WRIT	14
A. Prior Restraints Against Political Speech Are A Growing And Disturbing Practice That Requires This Court's Review	15
B. The Mississippi Supreme Court's Waiver Rule Burdens Access To Federal Court Relief And Threatens To Insulate Prior Restraints From Judicial Review	19
CONCLUSION	22

TABLE OF CONTENTS—Continued

APPENDICES — Page

February 7, 2002, Order Of The Supreme Court Of Mississippi (No. 2000-CA-02048-SCT) 1a

February 28, 2002, Mandate Of The Supreme Court Of Mississippi 3a

November 5, 2000, Temporary Restraining Order Of The Chancery Court Of The First Judicial District Of Jones County, Mississippi 4a

November 2, 2000, Judge Wingate's Decision In *Chamber Of Commerce v. Moore*, No. 3:00CV778WS, 2000 WL 33709454 (S.D. Miss. Nov. 2, 2000) (Attachments Omitted) 6a

November 3, 2000, Application For Temporary Restraining Order In The Chancery Court Of Hinds County, Mississippi (Attachment Omitted) 32a

Transcript Of The November 3, 2000, Proceeding Held In The Chancery Court Of The First Judicial District Of Hinds County, Mississippi (Excerpts) 38a

November 3, 2000, Order Of The Chancery Court Of The First Judicial District Of Hinds County, Mississippi Granting Plaintiffs' Motion For Temporary Restraining Order 42a

November 3, 2000, Chamber Motion For Stay Of Proceedings Pending Disposition Of Petition For Interlocutory Appeal (Attachments Omitted) 45a

November 3, 2000, Order Of The Supreme Court Of Mississippi 49a

November 4, 2000, Temporary Restraining Order Of The Chancery Court Of Harrison County, Mississippi 50a

TABLE OF CONTENTS—Continued

Page

November 5, 2000, Billy Joe Landrum's Verified Complaint Filed In The Jones County Chancery Court (No. 2000-0204)..... 53a

November 5, 2000, Chamber's Supplement To Motion For Emergency Stay Of A Prior Restraint On Political Speech (Attachments Omitted)..... 56a

November 6, 2000, Order Granting Plaintiff's Motion For Temporary Restraining Order Of The Chancery Court Of The First Judicial District Of Hinds County, Mississippi..... 60a

November 6, 2000, Order Of The Supreme Court Of The United States Re: Temporary Restraining Order Granted By The Chancery Court Of The First Judicial District Of Hinds County, Mississippi 63a

November 6, 2000, Order Of The Supreme Court Of The United States Re: Temporary Restraining Orders Granted By The Chancery Court Of Harrison County, Mississippi And By The Chancery Court Of The First Judicial District Of Jones County, Mississippi..... 64a

November 6, 2000, Application For Temporary Restraining Order And Preliminary Injunction (Attachment Omitted)..... 65a

November 7, 2000, Order Of The Supreme Court Of The United States Re: Temporary Restraining Order Granted By The Chancery Court Of The First Judicial District Of Hinds County, Mississippi 72a

December 4, 2000, Chamber Of Commerce Notice Of Appeal To The Mississippi Supreme Court In *Landrum v. Chamber Of Commerce* (Jones County Chancery Court No. 2000-0204-E)..... 73a

TABLE OF CONTENTS—Continued

Page

January 3, 2001, Appellee Landrum's Motion To Docket And Dismiss The Chamber Of Commerce's Appeal And Brief In Support (Attachments Omitted) 75a

January 23, 2001, Final Judgment Of The United States District Court For The Southern District Of Mississippi 86a

March 2, 2001, Mississippi Supreme Court's Order Denying Landrum's Motion To Docket And Dismiss The Chamber Of Commerce's Appeal..... 89a

March 14, 2001, Chancellor Frank McKenzie's Order On Proceedings In *Landrum v. Chamber Of Commerce* (No. 2000-0204-E)..... 90a

May 1, 2001, Brief Of Appellant The Chamber Of Commerce Before The Mississippi Supreme Court (Attachments Omitted)..... 93a

June 25, 2001, Brief Of Appellee Landrum Before The Mississippi Supreme Court..... 139a

October 23, 2001, Temporary Restraining Order Entered In *Bodack v. Law Enforcement Alliance Of America, Inc.* (PA Court of Common Pleas For Allegheny County No. GD-01-0121066) 157a

April 3, 2002, Amended Complaint Filed In *Landrum v. Chamber Of Commerce* (Chancery Court No. 2000-0204-E) 161a

April 5, 2002, Fifth Circuit's Decision In *Chamber of Commerce v. Moore*, No. 00-60779, 2002 WL 518636 (5th Cir. Apr. 5, 2002) 170a

TABLE OF CONTENTS—Continued

Page

April 26, 2002, Mississippi Supreme Court Docket Sheet In *Chamber Of Commerce v. Vollor* (Dkt. 2000-M-01839) 188a

Mississippi Election Statutes (Excerpts) 190a

TABLE OF AUTHORITIES

CASES Page

Alexander v. United States, 509 U.S. 544 (1993), *cert. denied*, 522 U.S. 869 (1997) 15
Bodack v. Law Enforcement Alliance of America, Inc., 790 A.2d. 277 (2001) 14, 18
Boddie v. Connecticut, 401 U.S. 371 (1971) 20-21
Buckley v. Valeo, 424 U.S. 1 (1976) 16
Chamber of Commerce v. Moore, No. 3:00CV778WS, 2000 WL 33709454 (S.D. Miss. Nov. 2, 2000) 2
Chamber of Commerce v. Moore, No. 00-60779, 2002 WL 518638 (5th Cir. Apr. 5, 2002) 7
Chamber of Commerce of the United States of America v. Vollor, 532 U.S. 1058 (2001) 4, 18
Donovan v. Dallas, 377 U.S. 408 (1964) 19-20
Elections Board v. Wisconsin Manufacturers & Commerce, 597 N.W.2d 721 (Wis. 1999), *cert. denied*, 528 U.S. 969 (1999) 14, 17
Elrod v. Burns, 427 U.S. 347 (1976) 18
FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 16
Felder v. Casey, 487 U.S. 131 (1988) 20
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 16
Freedman v. Maryland, 380 U.S. 51 (1965) 16
Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 20
General Atomic Co. v. Felter, 434 U.S. 12 (1977) 19-20
James v. Kentucky, 466 U.S. 341 (1984) 15
Lee v. Kemna, 122 S.Ct. 877 (2002) 15
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 20-21
Meyer v. Grant, 486 U.S. 414 (1988) 2

TABLE OF AUTHORITIES—Continued

	Page
M.L.B. v. S.L.J., 519 U.S. 102 (1996)	20
Moore v. Ogilvie, 394 U.S. 814 (1969)	2
Natural Gas Pipeline Co. of America v. Slattery, 302 U.S. 300 (1937)	20
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)	15
New York Times Co. v. United States, 403 U.S. 713 (1971)	14, 16
Republican Party of Florida v. Florida Elections Commission, 658 So. 2d 653 (Fla. Dist. Ct. App. 1995)	14, 17
Roe v. Wade, 410 U.S. 113 (1973)	3
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911)	3
United States v. Nixon, 418 U.S. 683 (1974)	13
Vance v. Universal Amusement Co., 445 U.S. 308 (1980)	16
Weinstein v. Bradford, 423 U.S. 147 (1975)	2
CONSTITUTION	
U.S. Const., Art. VI, cl. 2	4
U.S. Const. amend I	4
U.S. Const. amend XIV, § 1	4
STATUTES	
28 U.S.C. § 1257(a) (2000)	2, 13
28 U.S.C. § 2101(e) (2000)	13
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155	14
Miss. Code Ann. § 23-15-801 (2000)	6-7, 9
Miss. Code Ann. § 23-15-803 (2000)	5-6
Miss. Code Ann. § 23-15-807 (2000)	5-6
Miss. Code Ann. § 23-15-809 (2000)	6, 9
Miss. Code Ann. § 23-15-811 (2000)	6

TABLE OF AUTHORITIES—Continued

Page

Miss. Code Ann. § 23-15-813 (2000) 6
Miss. Code Ann. § 23-15-1021 (2000) 8-9
Miss. Code Ann. § 97-13-15 (2000) 6
Miss. Code Ann. § 97-13-17 (2000) 6

MISCELLANEOUS

13 James Wm. Moore, Moore's Federal Practice § 65.41 (3d ed. 1997) 3
15A Charles Alan Wright, et al., Federal Practice and Procedure, § 3912 at 449-50 (2d ed. 1992) 3
Beverly Pettigrew Kraft, *Chamber TV Ads On, Off Again*, The Clarion-Ledger, Nov. 7, 2000 ... 8, 10

IN THE

Supreme Court of the United States

No. ___

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JOE LANDRUM,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

The Chamber of Commerce of the United States of America ("Chamber") respectfully petitions for a writ of certiorari to review the February 7, 2002, Order of the Mississippi Supreme Court holding that, by seeking emergency relief from this Court, the Chamber waived its right to state appellate consideration of its First Amendment challenges to a prior restraint against the Chamber's political speech that was issued on Sunday, November 5, 2000, by the Chancery Court of the First Judicial District of Jones County, Mississippi.

OPINIONS AND ORDERS BELOW

The February 7, 2002, Order of the Mississippi Supreme Court (No. 2000-CA-02048-SCT) is at Pet. App. 1a. The November 5, 2000, Order of the Chancery Court of the First

Judicial District of Jones County, Mississippi (No. 2000-0204-E) is at Pet. App. 4a. Also included in the Appendix are the March 2, 2001, Order of a panel of the Mississippi Supreme Court denying the motion to dismiss the appeal and stays issued for this Court by Justice Scalia of the November 5 Order and of several similar Orders (Pet. App. 89a, 64a, 63a, and 72a). None of these orders is officially reported.[1]

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a) (2000).

The Petition Is Timely

The Mississippi Supreme Court entered its order on February 7, 2002.

The Petition Is Not Moot

Where, as here, "the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration" and "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again," this Court will grant review despite traditional jurisdictional constraints. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *see also Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

The November 5, 2000, prior restraint challenged here enjoined speech concerning the candidacy of Respondent Judge Landrum in an election that occurred two days later on

---

[1] Reference is made herein to an opinion of the United States District Court for the Southern District of Mississippi, *Chamber of Commerce v. Moore*, No. 3:00CV778WS, 2000 WL 33709454 (S.D. Miss. Nov. 2, 2000), and an opinion of the United States Court of Appeals for the Fifth Circuit reversing the district court, No. 00-60779, 2002 WL 518638 (5th Cir. Apr. 5, 2002). These opinions and their holdings are not challenged by this petition, but they are included as background material at Pet. App. 6a-31a and 170a-187a, respectively.

November 7, 2000, which Respondent lost. Elections typically occur over a relatively short period, and prior restraints against election-related speech tend to be granted as the election nears. But even if a prior restraint were granted months prior to an election, orderly pre-election review on the merits seldom, if ever, would be practical. *See Roe v. Wade*, 410 U.S. 113, 125 (1973) (the typical human gestation period is too short to allow orderly review). Thus, although the Chamber expects to engage in similar speech during future elections in Mississippi and elsewhere, there is little likelihood that similar future orders will reach this Court for review before the relevant election. In short, this case is not moot because this is a classic example of a case that is "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

The Petition Challenges A Final Ruling

The petition here challenges a final appellate judgment concerning a final trial court judgment.[2] The Mississippi Supreme Court's February 7, 2002, Order that the Chamber waived its right to appeal means that the November 5, 2000, Order cannot be reviewed for constitutionality unless

[2] Moreover, the underlying prior restraint order was final because it granted all the relief that Judge Landrum sought. *See* 15A Charles Alan Wright, et al., *Federal Practice and Procedure*, § 3912 at 449-50 (2d ed. 1992) ("[I]f suit is brought solely for the purpose of obtaining short-term injunctive relief, an order granting a temporary restraining order may be found appealable as a final judgment on the ground that it has effectively granted all the relief sought in the action"); 13 James Wm. Moore, *Moore's Federal Practice* § 65.41 (3d ed. 1997) ("the issue of appealability is not limited by the trial court's terminology"; "when the grant or denial of a temporary restraining order may dispose of the action for injunctive relief, the grant or denial has been held appealable"). Significantly, the Mississippi Supreme Court's Order of March 2, 2001, denied a motion to dismiss for lack of finality. (Pet. App. 89a).

certiorari is granted by this Court.[3] The Mississippi Supreme Court's waiver ruling is a final ruling. Significantly, the Mississippi Supreme Court denied Appellee Landrum's motion to dismiss the appeal for lack of finality.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, clause 2, provides that the "Constitution, and the laws of the United States . . . shall be the supreme Law of the Land; and that Judges in every state shall be bound thereby, anything in the Constitutions or Laws of any state to the contrary notwithstanding."

The First Amendment to the United States Constitution provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend I.

The Fourteenth Amendment to the United States Constitution forbids any State to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" or to "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1.

No Mississippi statute purports to authorize either the prior restraint or the waiver challenged through this petition. This petition does not request construction or invalidation of any

---

[3] A petition for writ of certiorari challenging another similar prior restraint related to the same Chamber of Commerce broadcasts was filed on February 1, 2001. *Chamber of Commerce v. Vollor,* S. Ct. Dkt. No. 00-1255. The respondent there argued that the Mississippi Supreme Court first should be given a chance to consider an appeal on the merits, and certiorari was denied by this Court's order of May 29, 2001. *Chamber of Commerce v. Vollor*, 532 U.S. 1058 (2001). The Mississippi Supreme Court's February 7, 2002, Order removes that prematurity objection, and raises a separate and distinct issue of importance to future elections that also merits review.

Mississippi statute regulating elections. However, certain Mississippi campaign finance statutes form part of the litigation background from which this petition arises and, thus, are included at Pet. App. 190a.

STATEMENT OF THE CASE

This petition challenges one of four Mississippi state court orders that enjoined the public broadcast of certain Chamber advertising just before Mississippi's November 7, 2000, election of four members of the Mississippi Supreme Court. The core objective of the petition is to establish explicitly and authoritatively that the increasing tendency of state courts to enjoin political speech is unconstitutional.

The Chamber is a non-profit organization that represents business interests in dealing with all branches and phases of government. Concerned that Mississippi voters understand the issues raised by the Supreme Court candidates and race, the Chamber produced television advertisements that it aired during the three weeks before the election. These advertisements addressed the background, experience, and qualifications of several candidates.

Prior Restraints Of Chamber Political Speech

Shortly after the Chamber began running its ads, a dispute arose with Mississippi's Secretary of State Eric Clark and Attorney General Michael Moore as to whether the Chamber's ads contained "express advocacy" and, hence, might be subject to regulation by Mississippi. Seeking to clarify the legal situation, the Chamber brought a declaratory judgment action in the United States District Court for the Southern District of Mississippi, *Chamber of Commerce v. Moore*, No. 3:00CV778WS (S.D. Miss. filed Oct. 23, 2000). The action named Attorney General Moore and Secretary of State Clark as the defendants.[4]

---

[4] Mississippi law imposes registration and disclosure requirements on organizations that make "expenditures," Miss. Code Ann. §§ 23-15-803 &

On November 2, 2000, United States District Court Judge Henry T. Wingate issued a Memorandum Opinion and Order in the Chamber's declaratory judgment action, No. 3:00CV778WS, 2000 WL 33709454 (S.D. Miss. Nov. 2, 2000). (Pet. App. 6a). As Judge Wingate explained, defendants had argued only that the Chamber's ads "expressly advocate the election of the favored candidates for the four Mississippi Supreme Court seats," (Pet. App. 8a), and thus were "'independent expenditures' subject to the reporting requirements" of Mississippi law. (Pet. App. 10a). Defendants had acknowledged having "no proof whatsoever of any collaboration between the Chamber ... the candidates involved in the advertisements." (Pet. App. 8a).

Judge Wingate's descriptions of the ads appear at Pet. App. 12a-14a. He recognized that the advertisements lacked explicit language advocating electoral action. However, adopting what he conceded to be a minority legal position, Judge Wingate ruled that the Chamber's ads fell within a "[b]roader [i]nterpretation" of express advocacy. (Pet. App. 21a-31a). Thus, Judge Wingate concluded that the "Chamber must answer under Mississippi's contribution limits and

---

23-15-807 (2000). Additional reporting requirements apply to organizations that make "independent expenditures" that "expressly advocat[e] the election or defeat of a clearly identified candidate." *Id.* §§ 23-15-801(j) & 23-15-809. Mississippi law also restricts direct or indirect corporate "contributions" made "for the purpose of aiding any political party or any candidate for any public office." *Id.* § 97-13-15. (See Pet. App. 192a, 191a, 194a, and 201a). No one has disputed that these provisions apply only to speech that "in express terms advocate[s] the election or defeat of a clearly identified candidate" within the holding of *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam). Defendants argued, however, that the Chamber's ads were express advocacy because they clearly implied support of or opposition to particular candidates. The Mississippi election law does not purport to authorize injunctive relief as to violative advertisements, but instead provides for post-violation punishment. *Id.* §§ 23-15-813 (civil penalties); 23-15-811 & 97-13-17 (criminal penalties). (Pet. App. 196a, 195a, and 202a).

reporting requirements as found at Mississippi Code Annotated §§ 23-15-801 et seq." (Pet. App. 31a). This opinion made no mention of injunctive relief.

The district court ruling did not become final until Judge Wingate entered judgment on January 23, 2001. (Pet. App. 86a). The Chamber promptly appealed, and on April 5, 2002, a panel of the Fifth Circuit unanimously reversed. *Chamber of Commerce v. Moore*, No. 00-60779, 2002 WL 518638 (5th Cir. Apr. 5, 2002) (Pet. App. 170a).[5]

Although the district court ruling admittedly rested on a minority legal view and now has been reversed, Petitioner does *not* seek, through this petition, a further exegisis of the "express advocacy" standard. Regardless of whether Judge Wingate's opinion was right or wrong, Petitioner's First Amendment challenge to the prior restraint remains intact.

Beginning on Friday, November 3, 2000, Mississippi chancellors began summarily enjoining the Chamber's broadcast advertisements concerning the impending November 7 election. The first such order was issued at about 4:00 p.m. on Friday, November 3, after a brief hearing of which the Chamber's counsel received only oral notice and at which he received the motion papers as he arrived. (Pet. App. 42a, 38a, and 32a). In those papers, the plaintiff, Judge Vollor, asserted that Judge Wingate's opinion of the day before established that the Chamber's ads were unlawful and that, because the election was imminent, an immediate ban on the Chamber's advertisements was necessary to protect Judge Vollor from them. Such an order was issued.[6] (Pet. App. 42a).

---

[5] A petition for rehearing en banc was filed on April 25, 2002.

[6] The order forbade both the Chamber and a variety of television stations from:

> contracting to transmit or transmitting any television advertisement, which is paid for or produced by the Chamber of Commerce of The

That same afternoon, the Chamber sought an emergency stay from the Mississippi Supreme Court, arguing there, as its counsel had at the hearing, that the order violated the First Amendment. (Pet. App. 45a). At 6:00 p.m., the Mississippi Supreme Court "denied" the Chamber's stay application as "without merit."[7] (Pet. App. 49a). The Chamber then turned to this Court.

Stays By This Court And More State Restraints

The Chamber's November 4, 2000, Motion for Emergency Stay of a Prior Restraint on Political Speech (No. 00A406) was delivered to this Court on Saturday, November 4. On the morning of Monday, November 6, 2000, Justice Scalia ordered stayed the November 3 prior restraint "pending the timely filing and disposition of a petition for writ of certiorari." (Pet. App. 63a).

Meanwhile, on Saturday, November 4, the Chancery Court of Harrison County issued another prior restraint, this one at the request of candidate Supreme Court Justice Oliver Diaz. (Pet. App. 50a). The next day, Sunday, November 5, the Chancery Court of Jones County granted to Judge Landrum the prior restraint challenged by this petition. (Pet. App. 4a). Both of these orders were issued ex parte.

Judge Landrum's verified complaint alleged that the Chamber "purchased political advertisements promoting an

---

> United States of America, its agents, servants, or employees, concerning the Central District election for the Supreme Court of Mississippi between Jim Smith and Frank G. Vollor.

(Pet. App. 44a). The enjoined stations ceased broadcasting the ads. *See* Beverly Pettigrew Kraft, *Chamber TV Ads On, Off Again*, The Clarion-Ledger, Nov. 7, 2000, *available at* http://www.clarionledger.com/news/0011/07/07chamber.html.

[7] This Order was entered by a panel composed of Presiding Justice Banks and Justices McRae and Waller, none of whom then was a candidate for election.

opponent of the Petitioner, said ads being in violation of § 23-15-1021" of the Mississippi Code and further alleged, erroneously, that "the violation of said section has been found in an Opinion written by the Honorable Henry T. Wingate." (Pet. App. 54a). Of course, that was not accurate. Even assuming that the Wingate opinion justified a prediction that the current Chamber ads were likely to be determined to be "express advocacy"—a counter-factual assumption—the opinion expressly noted the absence of any coordination by the Chamber with any candidate. (Pet. App. 8a). Absent coordination, even express advocacy would not constitute unlawful speech. *See supra* n.4. At most, Judge Wingate's opinion suggested that the Chamber might eventually be obliged to file a report with Mississippi authorities.[8] Judge Landrum offered no evidence of any coordination. However, since the order was issued ex parte on Sunday afternoon, the Chamber had no opportunity to discuss those points with the court.

Because the new prior restraints and the applications therefor were not materially different from the first, and because resort to the Mississippi Supreme Court would be futile, the Chamber immediately supplemented its stay application in this Court, seeking relief from those further orders as well. *See November 5, 2000, Supplement to Motion for Emergency Stay of a Prior Restraint on Political Speech (No. 00A406)* (Pet. App. 56a). At about noon on November 6, Justice Scalia issued a further Order staying the November 4 and 5 Orders. (Pet. App. 64a).

On Monday, November 6, after Justice Scalia had stayed the first order, Judge Vollor's counsel went back before the same Hinds County Chancellor who had issued the first prior restraint. Ostensibly acting on behalf of "William A. Pyle, a

---

[8] Mississippi law imposes reporting requirements on organizations that make "independent expenditures." Miss. Code Ann. §§ 23-15-801(j) & 23-15-809 (2000). (Pet. App. 191a and 194a).

citizen of Mississippi," Judge Vollor's counsel applied for a new prior restraint. (Pet. App. 65a). (In fact, Mr. Pyle is a lawyer and had assisted Judge Vollor's counsel in an undescribed capacity during the first TRO hearing of November 3.) (Pet. App. 39a). The motion papers confirm that both counsel and the Chancellor were aware of Justice Scalia's stay. (Pet. App.70a). Judge Vollor's lawyer and the Chancellor both knew who was representing the Chamber since he had appeared to oppose issuance of the first prior restraint on November 3. Nevertheless, without giving notice to the Chamber or permitting it any opportunity to be heard, the Chancellor granted another and even broader injunction against the Chamber's election-related speech. (Pet. App. 60a). Again, the papers relied on Judge Wingate's opinion as the only evidence of supposed illegality.

Upon obtaining the fourth prior restraint, the Chamber again supplemented its application for a stay from this Court. *See November 6, 2000, Second Supplement for Emergency Stay of a Prior Restraint on Political Speech (No. 00A411).* Another stay was promptly granted by Justice Scalia. (Pet. App. 72a). Stations resumed broadcasting Chamber ads on the evening of November 6.[9]

The Mississippi Supreme Court's Appeal-Rights Waiver Ruling

Judge Landrum came in third in the November 7 balloting and thus was eliminated as a candidate. Shortly thereafter, the Chamber timely appealed the Landrum prior restraint to the Mississippi Supreme Court. (Pet. App. 73a). Judge Landrum then moved to dismiss the appeal as not being taken from a "final order." (Pet. App. 75a). The Chamber responded that, under both Mississippi and federal practice,

---

[9] *See* Beverly Pettigrew Kraft, *Chamber TV Ads On, Off Again*, The Clarion-Ledger, Nov. 7, 2000, *available at* http://www.clarionledger.com/news/0011/07/07chamber.html.

an order that grants a plaintiff all the relief he seeks is final, regardless of what it is called. *See supra* at n.2. A panel of the Mississippi Supreme Court denied the motion to dismiss. (Pet. App. 89a). The appeal was then briefed and, at the court's direction, submitted for decision without oral argument.

The Chamber's brief argued, *inter alia*, that the ex parte order constituted an unconstitutional prior restraint. (Pet. App. 93a). Judge Landrum's brief argued, *inter alia*, that temporary restraining orders are not appealable, the Court might sidestep broader issues by invalidating the order involved for lack of prior notice to the Chamber, and, on the propriety of the ex parte order itself, that "the Chancellor did not err or abuse his discretion in granting the TRO." (Pet. App. 139a).

Neither party argued or suggested any waiver of appellate rights by the Chamber. Nevertheless, the Mississippi Supreme Court's single-page February 7, 2002, Order, denying the Chamber relief, provided as follows:

> This matter having come before the en banc Court on the appeal filed by the Chamber of Commerce of the United States of America (Chamber) in the above styled case. After due consideration, *we find that the Chamber waived its right to appeal this case to this Court when it chose to file a motion to stay the state court proceedings with the United States Supreme Court.* Furthermore, the Court considered the fact that the Chamber failed to appear at the temporary restraining order (TRO) hearing in the Chancery Court of the First Judicial District of Jones County. This Court takes notice that the TRO issued by the Chancery Court of the First Judicial District of Jones County expired within ten (10) days. The case is hereby remanded to the Chancery Court of the First Judicial District of Jones County for any further proceedings not inconsistent with this order.

(Pet. App. 1a) (Emphasis added).

Significantly, the Mississippi Supreme Court did not reverse the panel's ruling that the appeal otherwise was proper. Instead, exercising its jurisdiction, it held that the Chamber had "waived its right to appeal this case to this [Mississippi] Court" by filing "a motion to stay the state court proceedings" with this federal Court.[10] The Order cited no authority for the waiver rule relied upon, and Petitioner knows of none.[11]

The Order also comments that the "Court considered the fact that the Chamber failed to appear at the temporary restraining order (TRO) hearing in the Chancery Court of the First Judicial District of Jones County," but it does not ascribe any weight to that consideration. Nor could it plausibly have done so. The prior restraint order set "a hearing . . . on whether or not this injunction should become permanent on the 8th day of November." (Pet. App. 5a). Since the election occurred on November 7 and Judge Landrum lost, there was no possibility that "this injunction"—which only dealt with election-related speech adverse to Judge Landrum's candidacy—could be made permanent. As described in the Order On Proceedings that the trial judge prepared for the Mississippi Supreme Court, when the Chamber did not appear on November 8, the trial judge displayed no surprise and evinced no displeasure, nor did he

---

[10] The Order states that the appeal was considered "en banc." Of the nine then-sitting Mississippi Supreme Court justices, three were candidates in the November 7, 2000, election, and two, Justice Diaz (TRO #2 and TRO #3) and Justice Smith (TRO #1 and TRO #4) were candidates in the races addressed by the prior restraints.

[11] The Chamber petitioned the Mississippi Supreme Court to review the first prior restraint, but that Court never accepted the appeal or set a briefing schedule. *Chamber of Commerce v. Vollor*, No. 2000-M-01839. (Pet. App. 188a). Because the Chamber sought relief in this Court as to all of the Mississippi prior restraints, the waiver rule applied in this case by the Mississippi Supreme Court presumably would apply to that appeal also.

take any action as a result.[12] (Pet. App. 90a). As noted above, Respondents' brief to the Mississippi Supreme Court did not argue that any waiver had occurred.

Following the Mississippi Supreme Court's February 7, 2002, Order, Billy Joe Landrum obtained leave to amend his complaint to seek a "permanent injunction," as well as "compensatory and actual damages and punitive damages" from the Chamber, while dropping the media defendants who apparently had defeated diversity jurisdiction.[13] (Pet. App. 161a). On April 8, 2002, the Chamber removed the new claim to federal court on the grounds, *inter alia*, that diversity now exists and that Judge Landrum's new claim for emotional injury damages based on a previously unheard of tort of interference with an election is an entirely new claim for which a new removal period runs.[14] The parties have agreed to stay that action pending the outcome of this petition and of any further appeal of the Fifth Circuit ruling.[15]

---

[12] Moreover, and ironically, although the Chamber's Washington, D.C. counsel ultimately obtained a copy of the prior restraint order informally, Judge Landrum and his counsel never served it on the Chamber's Mississippi counsel. That counsel (who spent November 6 litigating another matter for the Chamber), never received a copy or learned of the potential November 8 hearing until much later.

[13] That leave was obtained orally during a hearing on April 3, 2002, before the Fifth Circuit's April 5, 2002, decision in *Moore* was released.

[14] See *Billy Joe Landrum v. Chamber of Commerce, John Does A-Z*, No. 2:02CV93PG (S.D. Miss. filed Apr. 8, 2002).

[15] Nothing in 28 U.S.C. § 1257(a) (2000) suggests that this Court's express authority to review the final judgment or decree of a state supreme court is defeated when a post-judgment ruling by a state trial court leads to federal removal. However, if the Court deemed it necessary to perfect or maintain its jurisdiction, it could grant certiorari before judgment to the U.S. District Court for the Southern District of Mississippi under 28 U.S.C. § 2101(e) (2000). See *United States v. Nixon*, 418 U.S. 683 (1974).

REASONS FOR GRANTING THE WRIT

The most fundamental reason that certiorari should be granted is to correct the increasing tendency of state courts to impose summary prior restraints on core political speech as a way of preventing supposed election law violations. The First Amendment simply does not allow injunctions against future political speech—at least in absence of an imminent threat to national security. *See New York Times Co. v. United States*, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring).

Regrettably, the four Mississippi prior restraints issued prior to the 2000 elections do not stand alone. Before the Mississippi events described above, similar restraints were imposed by state courts in Wisconsin and Florida. *See Elections Bd. v. Wisc. Mfrs. & Commerce*, 597 N.W.2d 721, 725 (Wis. 1999), *cert. denied*, 528 U.S. 969 (1999); *Republican Party of Fla. v. Fla. Elections Comm'n*, 658 So. 2d 653, 653-55 (Fla. Dist. Ct. App. 1995). A similar scenario was recently played out in connection with the November 6, 2001, Pennsylvania Supreme Court elections. *See* Order in *Bodack v. Law Enforcement Alliance of Am., Inc.*, Pa. Ct. Common Pleas (Allegheny Cty.) No. GD-01-121-66 (Oct. 23, 2001). (Pet. App. 157a). In that case as well, the Pennsylvania Supreme Court denied an application for emergency relief from the prior restraint. *Bodack v. Law Enforcement Alliance of Am., Inc.*, 790 A.2d 277 (2001). It is no secret that there is a strong inclination in some quarters to greatly expand regulation of campaign speech.[16] Unless this Court swiftly and authoritatively reaffirms the

---

[16] The recently-enacted Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, seeks to replace the "express advocacy" test with a broader standard for federal purposes. Whatever standard applies, the issue of using summary prior restraint to ban political speech remains the same.

fundamental impropriety of imposing prior restraints on political speech, this practice will continue, and expand.

The Court also should grant the writ to vindicate its own critical role in our federal system. The fourth Mississippi prior restraint, knowingly issued on November 6 in the face of the stays granted by Justice Scalia, might be disregarded as a regrettable act by one individual. But the Mississippi Supreme Court's invention of a new rule that a party who seeks relief from this Court may be penalized by loss of state appellate rights is a considered act that also is notably hostile to this Court's role. Moreover, it is contrary to the Supremacy Clause and to due process.[17] This petition does *not* ask this Court to revisit the meaning of "express advocacy." That issue is separate and distinct from the propriety of issuing prior restraints against political speech.

A. Prior Restraints Against Political Speech Are A Growing And Disturbing Practice That Requires This Court's Review.

"Temporary restraining orders and permanent injunctions —*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993), *cert. denied*, 522 U.S. 869 (1997).

Prior restraints are "the most serious and the least tolerable" form of speech regulation. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (collecting authority). They are strongly presumed to be unconstitutional, even when their

---

[17] In any event, the newly announced "waiver" rule is not an adequate and independent state ground that would bar consideration of the First Amendment claim. Only "'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim." *Lee v. Kemna*, 122 S.Ct. 877, 885 (2002) (quoting *James v. Kentucky*, 466 U.S. 341 (1984)).

goal is to regulate a form of speech that the First Amendment does not protect. *See Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980) (per curiam) (collecting authority).[18] Where a prior restraint otherwise might be permissible, such as in regulating obscenity, it may not be imposed until after a final determination that the speech actually is obscene. *See id.* at 316-17. Political speech lies at the heart of the First Amendment. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). This Court has never sustained an injunction against prospective political speech. Although *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), held that so-called "express advocacy" may be regulated and that violations may be punished, they never suggested that prior restraints—much less summary prior restraints after little or no chance to respond—are appropriate. However, this Court has not explicitly and directly held that such prior restraint is forbidden, *and those seeking such restraints now can point to at least nine such orders in recent years*, two of which issued despite the stays granted by Justice Scalia in dealing with the 2000 Mississippi election situation.

The circumstances that led to the Mississippi injunctions are clear. Busy trial judges were importuned by candidates (fellow judges in Mississippi) with urgent claims that they were being injured by unlawful activity that, if not stopped immediately, would influence an impending election, causing them irreparable injury. Reassured by *Buckley* and *MCFL*

---

[18] *Freedman v. Maryland*, 380 U.S. 51 (1965), contains criteria applicable to prior restraints. However, Justice Brennan, the author of *Freedman*, later explained that it "rest[s] upon the proposition that 'obscenity is not protected by the freedoms of speech and press.'" *New York Times Co.*, 403 U.S at 726 n.* (1971) (Brennan, J., concurring). Following that concurrence, this Court has not applied *Freedman* to speech that categorically is protected by the First Amendment.

that some election-related political speech is subject to regulation, the trial courts summarily granted injunctions, even on an ex parte basis. As a result, advertising was suppressed at a vital time for political speech, immediately before an election.

Mississippi judges were not the first to grant prior restraints against political speech, nor were they the last. Comparable prior restraints earlier had been imposed in both Wisconsin and Florida. In Wisconsin, at least three state circuit courts issued election-week temporary injunctions restraining an organization, WMC Issues Mobilization Council, Inc., from broadcasting its advertisements related to legislative elections to be held on November 5, 1996. *See Wisc. Mfrs. & Commerce*, 597 N.W.2d at 725. Despite emergency challenges by WMC Issues Mobilization Council, Inc. the injunctions remained in place. *Id.* In Florida, the state Democratic Party sought and received emergency injunctions before the November 8, 1994, election to stop television broadcasts of two political ads purchased by the Republican Party of Florida. A temporary injunction issued from November 2 to November 4 and, after another hearing, from November 4. On December 1, after the election, a Florida circuit judge issued a supplemental temporary injunction after hearing a motion for reconsideration. *Republican Party of Fla.*, 658 So. 2d at 653-55. Only belatedly did an appellate Florida court reverse one of these injunctions as "an unconstitutional prior restraint of speech." *Id.* at 654, 657.

Following the November 7, 2000, Mississippi elections, a similar TRO restraint was employed prior to the Pennsylvania Supreme Court elections held on November 6, 2001. At that time, only the stays of the Mississippi TROs entered by this Court suggested direct judicial disapproval of the Mississippi TROs, and the influence of those stays may have been diminished by this Court's May 29, 2001, denial of the

related petition for certiorari.[19] In any event, on October 23, 2001, two candidates who were incumbent Pennsylvania Supreme Court Justices secured a TRO from the Pennsylvania Court of Common Pleas against the Law Enforcement Alliance of America, Inc. (LEAA), restraining any advertisments broadcast for the purpose of influencing the outcome of the November 6, 2001, judicial elections unless LEAA certified compliance with the Pennsylvania political committee registration and reporting requirements.[20] Efforts to secure relief from the Pennsylvania Supreme Court proved unsuccessful, *Bodack*, 790 A. 2d at 277, and the restraint remained in effect until after the election.[21]

In sum, such prior restraints are a growing phenomenon. At least nine have been granted, only one was set aside, and none have been successfully challenged prior to the impending election except by stays from this Court. State courts are not subject to review by the federal courts of appeals. Only this Court can step in and make clear on a national basis that prior restraints on speech cannot be tolerated, at least in the absence of the most exigent

---

[19] *Vollor*, 532 U.S. at 1058.

[20] Order in *Bodack v. Law Enforcement Alliance of Am., Inc.*, Pa. Ct. of Common Pleas (Allegheny Cty.) GD-01-121-66 (Oct. 23, 2001) (Pet. App. 157a).

[21] The Pennsylvania Supreme Court appeared to reason that either the challenged speech was intended to affect the election, in which case it properly was regulated, or it was not tied to the election, in which case suppressing the speech until after the election would not particularly injure the speaker. *Bodack*, 790 A. 2d at 278. However, elections are times when citizens are especially focused on political issues and, hence, are particularly vital times for political speech, whether or not it is intended to influence the election. Moreover, this Court has stressed that even brief periods of speech suppression inflict irreparable injury of constitutional dimension. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (plurality). And finally, there is no doctrine that a mere desire to affect an election deprives political speech of full constitutional protection.

circumstances, such as war or other threat to national security. Certainly such restraints cannot be justified by the alleged violation of regulatory requirements imposed by election law statutes or by claims of injurious falsehood of the type that have always been dealt with by defamation damages, not injunction.

B. The Mississippi Supreme Court's Waiver Rule Burdens Access To Federal Court Relief And Threatens To Insulate Prior Restraints From Judicial Review.

The Mississippi Supreme Court's February 7, 2002, Order deprived the Chamber of its right to appeal a denial of federally protected rights solely because the Chamber properly filed with this Court a motion for stay of the state court prior restraint. This Mississippi waiver rule, now that it is known, will force litigants such as the Chamber to make a choice between two undesirable options: (1) foregoing the possibility of timely relief from this Court, or (2) foregoing merits review by the state supreme court.

Thus, the effect of the Mississippi waiver rule is to substantially burden a Mississippi state court litigant's right to invoke a federal court remedy. This imposition appears designed to and could well have the effect of discouraging state court litigants from exercising their rights to seek emergency relief from this Court. State courts are not generally permitted to impose penalties designed to deny access to federal remedies or federal courts, and such a practice is particularly questionable in the context of enjoining political speech.

As this Court has construed the Supremacy Clause, "it is not within the power of state courts to bar litigants from filing and prosecuting *in personam* actions in federal courts." *General Atomic Co. v. Felter*, 434 U.S. 12 (1977) (per curiam) (applying principles adopted in *Donovan v.*

Dallas, 377 U.S. 408 (1964)). Similarly, the authority of states "to prescribe the rules and procedures governing suits in their courts . . . does not extend so far as to permit States to place conditions on the vindication of a federal right." *Felder v. Casey*, 487 U.S. 131, 147 (1988). Thus, "the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such a manner that all the substantial rights of the parties under controlling federal law [are] protected.'" *Id.* at 151 (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942)).

Simply stated, a state court has no business penalizing a litigant's resort to a federal remedy, particularly where that remedy's ultimate purpose will be frustrated by the penalty imposed. Such state action is contrary to the Supremacy Clause and to the principles of federalism it reflects.

Moreover, this Court's Fourteenth Amendment precedents have long recognized that state procedures that deprive civil litigants of the important right to be heard can constitute a denial of liberty or property without due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (state procedural rule denying relief where agency erroneously scheduled a hearing after a stated cutoff date held to violate due process); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (state court filing and service fees applicable to divorce cases held to prevent access to the divorce remedy by indigents so as to deny due process); *Natural Gas Pipeline Co. of Am. v. Slattery*, 302 U.S. 300 (1937) (applying statutory penalties for violation to a corporation pending attempt to test validity of order in the courts would be a denial of due process).[22]

---

[22] Some decisions have analyzed similar issues using equal protection concepts as well as due process concepts. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (Mississippi statutes requiring purchase of appeal record by indigent mothers as prerequisite to appeal in parental rights termination case held to violate equal protection and due process clauses).

Such decisions establish that "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan*, 455 U.S. at 429. In that context, this Court has interpreted the Due Process Clause "as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" *Id.* at 429-30 (quoting *Boddie*, 401 U.S. at 380). A "State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie*, 401 U.S. at 379. Moreover, a "system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated." *Logan*, 455 U.S. at 434-35.

A state court waiver rule of the type the Mississippi Supreme Court has adopted denies groups like the Chamber the liberty to engage in political speech in violation of due process within the meaning of the Fourteenth Amendment. Intervention by this Court is needed to limit expansion of this rule to others and to other states, as well as to relieve the burden faced by those engaging in political speech in Mississippi.

If the Mississippi waiver rule were adopted widely, prior restraints enjoining election-related speech would become increasingly unreviewable, with this Court's power to stay being the last remaining effective remedy. Review by this Court of this case is needed before such waiver rules combine with the increasing use of summary prior restraints on political speech to act as a fearsome one-two punch threatening political speakers such as the Chamber.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JAN WITOLD BARAN,
Counsel of Record
THOMAS W. KIRBY
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

MICHAEL B. WALLACE
PHELPS DUNBAR, L.L.P.
200 S. Lamar Street
Suite 500, Skytel Centre
Jackson, MS 39225

Counsel for Petitioner

Of counsel:

STEPHEN A. BOKAT
General Counsel
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, DC 20062

May 8, 2002

Serial: 92812

IN THE SUPREME COURT OF MISSISSIPPI

[Filed Feb. 7, 2002]

No. 2000-CA-02048-SCT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Appellant,

v.

BILLY JOE LANDRUM,
Appellee.

ORDER

This matter having come before the en banc Court on the appeal filed by the Chamber of Commerce of the United States of America (Chamber) in the above styled case. After due consideration, we find that the Chamber waived its right to appeal this case to this Court when it chose to file a motion to stay the state court proceedings with the United States Supreme Court. Furthermore, the Court considered the fact that the Chamber failed to appear at the temporary restraining order (TRO) hearing in the Chancery Court of the First Judicial District of Jones County. This Court takes notice that the TRO issued by the Chancery Court of the First Judicial District of Jones County expired within ten (10) days. The case is hereby remanded to the Chancery Court of the First Judicial District of Jones County for any further proceedings not inconsistent with this order.

IT IS THEREFORE ORDERED that the appeal in the above styled case filed by the Chamber of Commerce of the United States of America is remanded. All costs associated with the appeal are assessed to the Chamber.

SO ORDERED, this the 30th day of January, 2002.

/s/ Chuck Easley
CHUCK EASLEY
CHUCK EASLEY, JUSTICE

[SEAL]

MANDATE
SUPREME COURT OF MISSISSIPPI

To the Jones County Chancery Court 1st Judicial District—
GREETINGS:

In proceedings held in the Courtroom, Carroll Gartin Justice Building, in the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case #2000-CA-02048-SCT
Trial Court Case #2000-0204-E

Chamber of Commerce of the United States of America v. Billy Joe Landrum, Thursday, 7th day of February, 2002.

On Court's own motion, the appeal filed by the Chamber of Commerce of the United States of America is remanded to the Chancery Court of the First Judicial District of Jones County for any further proceedings not inconsistent with this order. All costs associated with this appeal are assessed to the Chamber of Commerce of the United Stated of America. Order entered.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Honorable Edwin Lloyd Pittman, Chief Justice of the Supreme Court of Mississippi; also the signature of the Clerk and the Seal of said Court hereunto affixed, in the City of Jackson, on February 28, 2002, A.D.

/s/ Betty W. Sephton
BETTY W. SEPHTON
Clerk

IN THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT OF
JONES COUNTY, MISSISSIPPI

CAUSE NO. [2000-0204-E]

BILLY JOE LANDRUM

Petitioner

Versus

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, WDAM, WLOX, WLIBT AND OTHER NEWS MEDIA

Respondents

TEMPORARY RESTRAINING ORDER

THIS CAUSE came on to be heard on VERIFIED COMPLAINT of the Petitioner, Billy Joe Landrum, and the Court after having heard said COMPLAINT herein and being advised in the premises is of the opinion and doth find that sufficient cause exists for the entry of a Temporary Restraining Order as hereinafter set forth.

1. That the Chamber of Commerce, of the United States of America has purchased political advertisements promoting an opponent of the Petitioner, said ads being in violation of §23-15-1021 of the Mississippi Code, annotated as amended.

2. That the violation of said section has been found in an Opinion written by the Honorable Henry T. Wingate, Federal District Judge for the Southern District of Mississippi, Jackson Division.

3. That the election for which these advertisements were purchased, is scheduled for Tuesday, November 7, 2000, and unless this Court enters a Temporary

Restraining Order, there will be immediate and *irreparable injury, loss and damages* to the Petitioner as a result of the instant advertisements being broadcast in violation of the previously identified statute.

IT IS THEREFORE ORDERD, ADJUDGED AND DECREED that the Respondents, the Chamber of Commerce of the United States of America, WDAM, WLOX, WLBT and other news media and televisions stations are hereby restrained and enjoined from creating, broadcasting or publishing within the jurisdiction of this Court are hereby temporarily enjoined from broadcasting or publishing any paid advertisements concerning the race for the Supreme Court in which the name of the Petitioner, Billy Joe Landrum.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that prior notice is impractical due to the fact that the election for which the advertisements are aimed is Tuesday, November 7, 2000, and there is therefore not sufficient time to give notice to the Respondents, but the Court orders a hearing to be set on whether or not this injunction should become permanent on the 8th day of November, 2000, at 9:00 a.m.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petitioner shall surrender a cash bond unto the Court in the amount of $500.00.

SO ORDERED, ADJUDGED AND DECREED on this 5th day of November, 2000, at 3:00 pm.

/s/ _____
Chancellor

Submitted By

/s/ _____
Thomas T. Buchanan-Bar #7022

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI
Jackson Division

No. 3:00CV778WS

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
Plaintiff,

v.

MICHAEL MOORE, ATTORNEY GENERAL, STATE OF MISSISSIPPI, ERIC CLARK, SECRETARY OF STATE, STATE OF MISSISSIPPI,
Defendants.

Nov. 2, 2000

MEMORANDUM OPINION AND ORDER

WINGATE, District J.

Before the court is plaintiff's Motion for Expedited Declaratory Relief under Title 28 U.S.C. §§ 2201 [1] and

---

[1] Title 28 U.S.C. § 2201 provides:

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under *section 7428 of the Internal Revenue Code of 1986*, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such

2202.[2] By its motion, plaintiff Chamber of Commerce of the United States of America (hereinafter "Chamber") asks this court to declare that it may televise certain political advertisements favoring specific candidates for the popularly elected Mississippi Supreme Court without being subjected to Mississippi's law pertaining to election contributions and reporting. To be answerable under Mississippi's laws, says the Chamber, the independent expenditure by a third party must expressly advocate the election or defeat of a clearly identified candidate without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate. According to the Chamber, their advertisements discuss issues of public interest; have not been coordinated with any particular candidates; and do not advocate for the election of any candidate. Thus, says the Chamber, if subjected to Mississippi's contribution limits and reporting requirements, it will suffer a severe impairment of its free speech rights under the First Amendment of the United States Constitution.[3]

---

declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[2] Title 28 U.S.C. § 2202 provides:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

[3] The First Amendment of the United States Constitution provides that, "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech,* or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Attorney General and the Secretary of State of the State of Mississippi (hereinafter "the State of Mississippi"), defendants in this cause, are opposed to plaintiff's requested declaratory relief. Admitting that they have no proof whatsoever of any collaboration between the Chamber and the candidates involved in the advertisements, the defendants contend that plaintiff's advertisements cross the boundary of issue advocacy into the arena of election advocacy and, thus, expressly advocate the election of the favored candidates for the four Mississippi Supreme Court seats.

This court's jurisdiction over this matter is asserted under Title 28 U.S.C. §§ 1331[4], 1334[5] and Title 42 U.S.C. § 1983.[6]

---

[4] Title 28 U.S.C. § 1331 states: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[5] Title 28 U.S.C. § 1334 states in part: (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

[6] Title 42 U.S.C.A. § 1983 provides that, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for

I. BACKGROUND

The State of Mississippi is currently in election season. In addition to the national election for President of the United States and members of Congress, Mississippi is also occupied with electing four members of its Supreme Court. Comprised of nine Justices who hail from three separate districts, the Mississippi Supreme Court, a popularly elected body, is the highest court in the State, standing in review of decisions rendered in the lower County, Circuit, Chancery, and Appeals Courts, themselves staffed by judges who are popularly elected. Except in event of a vacancy when the Governor of the State is empowered to appoint the office-holder, the members of the Mississippi Supreme Court are popularly elected by the citizenry of the respective districts and serve a term of eight years before having again to test the public's confidence at the polls. Although the contenders for the Mississippi Supreme Court are not allowed to run for the office on political party labels [7], the contenders, as any other office-seekers, strive to raise campaign funds, acquire television and radio appearances and post election signs.

---

an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

[7] Mississippi Code Annotated § 23-15-973 provides in pertinent part that, "[i] shall be the duty of the judges of the circuit court to give a reasonable time and opportunity to the candidates for the office of judge of the Supreme Court, judges of the Court of Appeals, circuit judge and chancellor to address the people during court terms. In order to give further and every possible emphasis to the fact that the said judicial offices are not political but are held without favor and with abosolute impartiality as to all persons, the judges thereof should be as far removed as possible from any political affiliations or obligations. It shall be unlawful for any candidate . . To align himself . . . with any political faction or any political party. . . ."

Predictably, the candidates, whether incumbent or challenger, run on their qualifications, accomplishments and experience. And, since elections for Mississippi Supreme Court Justices, in character and procedure, are alike any other State election, these elections, too, are covered by Mississippi's election disclosure and reporting laws found at Mississippi Code Annotated §§ 23-15-801, *et seq.*

On October 17, 2000 the United States Chamber of Commerce, a nonprofit corporation residing in the District of Columbia, began televising four advertisements in Mississippi which comment on the backgrounds and qualifications of four candidates for the Mississippi Supreme Court—incumbent Chief Justice Lenore Prather, Justices Jim Smith and Kay Cobb, and candidate Judge Keith Starrett. According to the Chamber, these advertisements do not fall within the embrace of Mississippi's election disclaimer and reporting laws because these advertisements do not advocate for the election or defeat, of these, or any candidates.

State Attorney General Mike Moore and Secretary of State Eric Clark disagree, contending further that these advertisements constitute "independent expenditures" subject to the reporting requirements of Mississippi Code Annotated §§ 23-15-801(j) [8] and 809 [9]. Faced with the perceived risk of

---

[8] Miss.Code Ann. § 23-15-801(j) provides: The term "independent expenditure" shall mean an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate.

[9] Miss Code Ann. § 23-15-809 provides: (a) Every person who makes independent expenditures in an aggregate amount or value in excess of Two Hundred Dollars ($200.00) during a calendar year shall file a statement containing the information required under Section 23-15-807. Such statement shall be filed with the appropriate offices as provided for

civil and criminal penalties [10] for continuing to televise these advertisements, the Chamber brought this lawsuit seeking to have this court declare its rights in this matter.

---

in Section 23-15-805, and such person shall be considered a political committee for the purpose of determining place of filing.

(b) Statements required to be filed by this section shall include:

(i) Information indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(ii)Under penalty of perjury, a certification of whether or not such independent expenditure is made in cooperation, consultation or concert with, or at request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(iii) The identification of each person who made a contribution in excess of Two Hundred Dollars ($200.00) to the person filing such statement which was made for the purpose of furthering an independent expenditure.

[10] Mississippi Code Annotated § 23-15-811 provides that, "(a) Any candidate or any other person who shall wilfully and deliberately and substantially violate the provisions and prohibitions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine in a sum not to exceed Three Thousand Dollars ($3,000.00) or imprisoned for not longer than six (6) months or by both fine and imprisonment.

(b) In addition to the penalties provided in paragraph (a) of this section, any candidate or political committee which is required to file a statement or report which fails to file such statement or report on the date in which it is due may be compelled to file such statement or report by an action in the nature of a mandamus.

(c) No candidate shall be certified as nominated for election or as elected to office unless and until he files all reports required by this article due as of the date of certification.

(d) No candidate who is elected to office shall receive any salary or other remuneration for the office unless and until he files all reports required by this article due as of the date such salary or remuneration is payable.

(e) In the event that a candidate fails to timely file any report required pursuant to this article but subsequently files a report or reports containing

II. THE ADVERTISEMENTS

The four advertisements precipitating this lawsuit are marked as Exhibits B, C, D and E to the plaintiff's complaint. Each advertisement is described below.

Exhibit B The Chief Justice Lenore Prather Advertisement

Exhibit B begins with the photograph of a gavel and a picture of Chief Justice Lenore Prather slowly materializes in the background. The narration states, "Lenore Prather -Chief Justice of Mississippi's Supreme Court; Lenore Prather—using common sense principles to uphold the law; Lenore Prather--putting victims rights ahead of criminals and protecting our Supreme Court from the influence of special interests." As the narration proceeds, the words "Chief Justice," "Common Sense," and "Victims Rights" appear on the screen. The narrator then states that Lenore Prather was the first woman appointed to the Mississippi Supreme Court, and that she has thirty-five years of experience.

Exhibit C The Judge Keith Starrett Advertisement

Exhibit C begins with the narration, "Keith Starrett—a common sense Justice." As pictures of Judge Starrett appear on the screen, followed by scenes of school children and scenes of citizens going about their daily routines, the narrator says that Keith Starrett formed the first drug court in Mississippi, and that Starrett's drug court saved taxpayers over one half million dollars in the first year. Then, as the words "Baptist Deacon" and "Victim's Rights Count" appear on the screen, the narration states, "a Baptist Deacon who once headed South Mississippi Child Protection, Starrett

---

all of the information required to be reported by him as of the date on which the sanctions of paragraphs (c) and (d) of this section would be applied to him, such candidate shall not be subject to the sanctions of said paragraphs (c) and (d).

knows victims have as much a right to justice as defendants do." The narration closes with, "Judge Keith Starrett—he knows victims rights count!"

Exhibit DThe Justice Kay Cobb Advertisement

Exhibit D is an advertisement touting incumbent Justice Kay Cobb. The narration provides the following, "A teacher, a prosecutor, a Supreme Court Judge. Justice Kay Cobb. At the Bureau of Narcotics she took drug pushers off the streets and put them behind bars. On the Supreme Court she uses common sense to protect the rights of victims." These words appear on the screen simultaneously as they are narrated. The narration then continues with, "Justice Kay Cobb has worked to end the judicial backlog, eliminate endless appeals and insure that death penalty cases are tried promptly." The narration concludes, "Justice Kay Cobb—victims rights count!"

Exhibit E The Justice Jim Smith Advertisement

Finally, Exhibit E is an advertisement for Justice Jim Smith. An American flag is in the background. The name Jim Smith remains visible throughout the narration, and a scales-of-justice appears in the left part of the screen. While the narration explains that Jim Smith uses common sense and puts victim's rights first, the words, "96% conviction rate" appear on the screen. The narrator states that, "[a]s a district attorney and prosecutor he had a 96% conviction rate. As a judge, he understands that victims rights come ahead of criminal's rights. Judge Jim Smith. For ten years on the Rankin County bench he upheld existing laws--instead of trying to make new ones. He carried that same common sense approach to the Supreme Court in 1993." The narration ends with, "Judge Jim Smith—common sense on the bench!"

All of the advertisements are about thirty seconds in length, and direct the viewer to a web site, *www.Litigation*

Fairness.org, which contains a link to web pages which urge the support of the election of two of these particular candidates, Justice Cobb and Judge Starrett, while presenting the biographies of Chief Justice Prather and Justice Smith. A sample of these web pages are attached to this opinion as an appendix.

The advertisements *sub judice* do not dwell on any particular issue, but instead ascribe attributes which a voter might find to be desirable in a candidate for judicial office to each of the named candidates. Nor do the advertisements discuss, mention, implicate or concern any person other than the particular candidate being touted in the advertisement. The prominent references to judicial philosophy (common sense) and victim's rights are not accompanied by any elaboration. While the plaintiff contends that technically there is no mention of an election in these advertisements, the State of Mississippi notes that they are being aired at the same time statewide judicial elections are being conducted.

III. STANDING AND RIPENESS

A federal court must find that Article III standing requirements are met before proceeding. These requirements include (1) "injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) causation, meaning that the injury is "fairly traceable to the challenged action of the defendant"; and (3) redressability, meaning that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Valley v. Rapides Parish School Board,* 145 F.3d 329, 332 (5th Cir.1998), citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). The standing component that deals directly with ripeness is the requirement of "imminence." In a declaratory action, the threatened injury must be "sufficiently 'imminent' to

establish standing." *Id.* A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *See Texas v. United States,* 523 U.S. 296, 118 S.Ct. 1257, 1259-60, 140 L.Ed.2d 406 (1998).

In the instant case the parties agree that the Chamber has standing, and the likelihood of litigation is conceded by the parties to be imminent. Therefore, the ripeness balance weighs in favor of addressing this controversy.

IV. THE APPLICABLE MISSISSIPPI STATUTES

The Mississippi statutes providing the focal point of this lawsuit are Mississippi Code Annotated §§ 23-15-801(j) and 23-15-809, statutes dealing with independent expenditures for the purpose of advocating a particular electoral result, but without consulting with or obtaining the cooperation of any candidate. The Attorney General acknowledges that the advertising expenditures in question are individual expenditures, and that he has no proof that the Chamber has consulted any candidate or acted in collusion with any candidate in presenting these advertisements.

Mississippi Code Annotated § 23-15-801(j) provides that the term "independent expenditure" shall mean an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate, without that candidate's cooperation or consultation. Mississippi Code Annotated § 23-15-809 provides that a person who makes independent expenditures in the amount or value of Two Hundred Dollars ($200.00) or more during a calendar year shall file a statement containing the information required under § 23-15-807.

The Chamber contends that if these statutes are applied to the advertisements in question, then their application will offend the First and Fourteenth Amendments of the United

States Constitution. The guaranties afforded by the First Amendment are protected by the due process clause of the Fourteenth Amendment. *Williams v. Rhodes,* 393 U.S. 23, 30-31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968); *New York Times v. Sullivan,* 376 U.S. 254, 276-77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686, 709 (1964); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1217 (1940); and *De Jonge v. Oregon,* 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278, 283 (1937). There is no question that political expression is protected speech under the First Amendment. *Colson v. Grohman,* 174 F.3d 498, 506 (5th Cir.1999), citing *Connick v. Myers,* 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The United States Supreme Court often has reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. *First National Bank v. Bellotti,* 435 U.S. 765, 776, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (stating that speech on matters of public concern is "at the heart of the First Amendment's protection"); and *RashAldridge v. Ramirez,* 96 F.3d 117, 119 (5th Cir.1996) (same).

V. THE UNITED STATES SUPREME COURT PRECEDENTS

The fountainhead case governing the issues of concern in the instant case is *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The *Buckley* decision limited the range of political speech that may be regulated by the Federal Election Campaign Act only to "express advocacy," that is, a communication which explicitly advocates the election or defeat of clearly identifiable candidates. The Supreme Court's decision distinguished "issue advocacy," which is the discussion of issues and/or candidates' positions on them. Under *Buckley,* this form of communication is not subject to regulation. The *Buckley* decision, particularly its statement at footnote 52, has given rise to what is now referred to as the

"express advocacy" standard. Footnote 52 of the *Buckley* opinion refers to § 608(e)(1) of the Federal Election Campaign Act and to the construction of statute's scope as being limited to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." Other courts have given the "express advocacy" standard the rubric "magic words" test, or "bright line" rule. *See Federal Election Commission v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir.1997), referring to the "magic words" of Buckley's footnote 52; *and see Faucher v. Federal Election Commission,* 928 F.2d 468 (1st Cir.), *cert. denied,* 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991) (for the reference to a "bright line" rule being established by *Buckley*). Whether the standard is referred to as "express advocacy" or "magic words," or the "bright line" rule, many courts interpret this standard to require words of advocacy such as those recited in footnote 52 of the *Buckley* opinion before regulatory jurisdiction over an independent or corporate expenditure can exist.

The United States Supreme Court revisited the *Buckley* decision in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 248-49, 107 S.Ct. 616, 623, 93 L.Ed.2d 539 (1986) (a case often referred to in short as "MCFL"). Here the Supreme Court was faced for the first time since its decision in *Buckley* with a form of advertisement, specifically, a newsletter.

The MCFL, an nonprofit group concerned with right-to-life issues, prepared and distributed a newsletter in the ordinary course of its operations. Prior to the September 1978 primary elections, the MCFL printed and distributed a "Special Edition" of its newsletter. While the May 1978 edition of the newsletter had been mailed to 2,109 people, and the October 1978 edition to 3,119 people, more than 100,000 copies of the

"Special Edition" were printed for distribution. The front page of the publication was headlined "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and readers were admonished that "[n]o pro-life candidate can win in November without your vote in September." "VOTE PRO-LIFE" was printed in large bold-faced letters on the back page, and a coupon was provided to be clipped and taken to the polls to remind voters of the name of the "pro-life" candidates. Next to the exhortation to vote "pro-life" was a disclaimer: "This special election edition does not represent an endorsement of any particular candidate."

The *MCFL* Court also held that an expenditure must constitute "express advocacy" in order to be subject to the statutory prohibition in question, and that the Special Edition constituted express advocacy, citing *Buckley.* The *MCFL* Court stated that, "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc." *MCFL*, 479 U.S., at 248, citing *Buckley, supra,* at 44, n. 52, 96 S.Ct., at 646, n. 52. The MCFL Court then noted that the Special Edition not only urged voters to vote for "pro-life" candidates, but also identified and provided photographs of specific candidates fitting that description. Said the Court, "[t]he Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, *it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature. . . .*" *MCFL*, 479 U.S., at 240 (Emphasis added).

Thus, the *MCFL* Court, faced with an actual communication, determined that "express advocacy" was present in the "Special Edition" of MCFL's newsletter based on the

timing of the edition, the unusually large quantity of copies being disseminated, and the exhortations to vote for pro-life candidates, notwithstanding the absence of the "magic words" found at footnote 52 of the *Buckley* decision.

VI. THE CIRCUIT DIVIDE

A. The Narrow Interpretation

Several Circuit Courts which have had the opportunity to apply the "express advocacy" test based on *Buckley* and *MCFL* have adopted a very narrow construction of what these cases require. For instance, in *Maine Right to Life Committee, Inc. v. Federal Election Commission, 914 F.Supp. 8 (D.Me.1996), aff'd per curiam, 98 F.3d 1 (1st Cir.1996)* (referring to *Buckley* as having established a "bright line" rule), a nonprofit membership corporation and a reader of its publications brought suit seeking a declaratory judgment that the Federal Election Commission's definition of "express advocacy" as to which corporate financial support was prohibited under the Federal Election Campaign Act was too broad, beyond authority, and unconstitutionally vague. The district court agreed, applying the bright line rule that a finding of "express advocacy" requires the presence in a communication of some or all of the explicit words found at footnote 52 of the *Buckley* opinion. Like *Buckley, Maine Right to Life Committee* dealt with the interpretation of legislation rather than a specific communication. *See also, Faucher v. Federal Election Commission,* 743 F.Supp. 64, 68 (D.Me.1990), *aff'd,* 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991), following *Buckley* by narrowly construing the same federal election laws considered in *Buckley.*

In *Federal Election* Commission *v. Christian Action Network,* 110 F.3d 1049 (4th Cir.1997), the Fourth Circuit affirmed the district court's dismissal of a Federal Election Commission lawsuit which complained that an advocacy

organization's expenditures for a television commercial violated federal election laws governing disclosure of campaign funds. The advertisement in question included the following text which was read by a narrator: "Bill Clinton's vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network."

The Fourth Circuit opted for the clear, categorical limitation of *Buckley,* holding that only expenditures for communications using explicit words of candidate advocacy are prohibited . . . ." *Id.* at 1051. The Fourth Circuit therefore rejected the Federal Election Commission's position that "express advocacy" could be established by looking at a group's use of imagery, rhetoric, and symbols in criticizing a candidate's position. *Id.,* at 1064.

In *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir.1999), various organizations which had as one of their purposes political speech sought a preliminary injunction against the enforcement of a provision of an Iowa Campaign Disclosure-Income Tax Check-off Act containing reporting requirements for independent political expenditures. The district court granted the injunction and the Eighth Circuit affirmed, holding that the Buckley decision made clear that a "finding of 'express advocacy' depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc." Significantly, the Eighth Circuit noted that Buckley did not provide an exclusive list of words, and that any such communication must contain express language of advocacy with an exhortation to elect or defeat a candidate. The Eighth Circuit also cited *Federal Election Commission v. Furgatch*, 807 F.2d 857, 864 (9th Cir.1987) and its teaching that speech

may be termed "advocacy" if it presents a clear plea for action. Speech that is merely informative, said the Eighth Circuit, is not covered by the Act. [11]

Vermont Right to Life Committee v. Sorrell, 221 F.3d 376 (2nd Cir.2000), involved a nonprofit corporation (the VRLC) whose goal was to promote right-to-life issues. The VRLC brought a § 1983 action against various state officials, seeking a declaratory judgment that certain sections of a Vermont campaign finance law establishing disclosure requirements for political advertising and reporting requirements for mass media expenditures were facially unconstitutional under the First Amendment. The Second Circuit reversed the district court's dismissal of the case, holding that the plaintiffs had standing. The Court noted that a significant issue would be whether the state statutes in question applied only to advertising and "mass media activities" "that expressly advocated the election or defeat of a clearly identified candidate," citing *Buckley*. *See also, Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 612 F.2d 45 (2nd Cir.1980), following the narrower standard based on *Buckle*'s footnote 52.

B. The Broader Interpretation

Set against the narrow interpretation applied by the First, Second, Fourth and Eighth Circuits is the Ninth Circuit's

---

[11] While the Eighth Circuit's decision is touted by the plaintiffs and strictly following *Buckley,* it is apparent that the Eight Circuit did not consider a finding of express advocacy to be stricly limited to the words contained in *Buckley*'s footnote 52, noting that in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987), the Ninth Circuit had allowed the prohibition of the "Don't Let Him Do It" speech as expressed advocacy, and recognizing that the ruling was "a very close call," *id.*, at 861.

decision in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987). According to *Furgatch,* express advocacy may exist if the purpose of the message in question is suggestive of only one meaning, makes a clear plea for action, and is clear as to what action is advocated. *Id.*, at 864.

Furgatch involved an enforcement action against an individual for publishing a newspaper advertisement critical of President Jimmy Carter and urging the readers "Don't let him do it." The Federal Election Commission (hereinafter the "FEC") sued, claiming a violation of Federal Election Campaign Act for the failure to report this expenditure to the FEC and to place a disclaimer on it. The Ninth Circuit agreed with the FEC that these violations had occurred, stating that, "reasonable minds could not dispute that Furgatch's advertisement urged readers to vote against Jimmy Carter. This was the only action open to those who would not 'let him do it.'" *Id.*, at 864. The court summarized its holding as follows:

> We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is ummistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable

> minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements. This is necessary and sufficient to prevent a chill on forms of speech other than the campaign advertising regulated by the Act. At the same time, however, the court is not forced under this standard to ignore the plain meaning of campaign-related speech in a search for certain fixed indicators of 'express advocacy.'"

Id., at 864.

The *Furgatch* decision takes its lead from the United States Supreme Court's decisions in both *Buckley* and *MCFL.*[12] Cases which have adopted the approach taken in the *Furgatch* decision are *FEC v. National Organization for Women*, 713 F.Supp. 428, 434 (D.D.C.1989); *Osterberg v. Peca*, 12 S.W.3d 31, 52 (Tex.2000); *Elections Bd. v. Wisconsin Manufacturers & Commerce*, 227 Wis.2d 650, 597 N.W.2d 721, 723-24, 731 (Wisc.1999); and *State ex rel. Crumpton v. Keisling*, 160 Or.App. 406, 982 P.2d 3, 10 (Or.Ct.App.1999).

In *Federal Election Commission v. National Organization for Women,* NOW used corporate money to pay for three

---

[12] The *Furgatch* Court cited the First Circuit's opinion in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 769 F.2d 13 (1st Cir.1985)(MCFL), which was on appeal to the United States Supreme Court at the time the *Furgatch* case was argued to the Ninth Circuit in June of 1986. On December 15, 1986, the United States Supreme Court affirmed the First Circuit's decision in *MCFL.* The Ninth Circuit handed down *Furgatch* on January 9, 1987. Even though the *Furgatch* Court may have missed the opportunity to include the United States Supreme Court citation in its final opinion draft, the relevant points of law remained the same. The First Circuit's *MCFL* decision being affirmed by the United States Supreme Court did not disturb the *Furgatch* decision.

letters sent to the general public which contained so called "electioneering messages." According to NOW, these letters were aimed solely at soliciting new members by setting forth the group's political goals. One of the letters in question urged the recipient to join NOW and to wear a 59 cents button as a symbol of the fact that women earn 59 cents for every dollar earned by men. While the letter focused on issues (wage discrimination, Social Security, divorce law, education), it also criticized political leaders for their adverse positions or lack of attention to these issues. Three sentences in the four-page "59 cents letter" are critical of public officials: "And now the Reagan Administration is threatening to make a dangerous situation even worse . . . ." "A bad economy, coupled with an antagonistic Administration in Washington, poses an immediate and real threat to the economic rights of women everywhere . . . . "; and "The New Right, the Reagan Administration, and the Republican Party all thought that "the ladies" would go away after the ERA deadline expired. Were they ever wrong!"

The district court held that this and two other similar letters contained no express advocacy as required by *Buckley* and *MCFL* to place the letters within the ambit of the federal statute. "The words listed in *Buckley*," said the district court, "are not the only ones which will be deemed express advocacy. In *Furgatch*, the Ninth Circuit held that express advocacy is not strictly limited to communications using certain key phrases. "The short list of words included in the Supreme Court's opinion in *Buckley* does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." *Furgatch*, 807 F.2d at 863. The court of appeals proposed a standard for express advocacy: that speech, when read as a whole and with limited reference to external events, may only be interpreted as an exhortation to vote for or against a specific candidate."

Following the broader standard, the district court concluded that, "[b]ecause the letters are suggestive of several plausible meanings, because there are numerous pleas for action, and because the types of action are varied and not entirely clear, NOW's letters fail the express advocacy test." 713 F.Supp., *at 435*. The district court also noted that NOW's three mailings included no explicit words directing the reader how to vote.

In *State ex rel. Crumpton v. Keisling,* the Oregon Court was confronted with mailings and newspaper advertisements that contained a "WARNING" that public employee unions were buying the "DEMOCRAT[IC] ELECTIONS." These advertisements contained the pictures of particular candidates and the amount of support each had received from public employee unions. The Oregon court expressed the same concerns as the Ninth Circuit in *Furgatch* that election laws must not be "cleverly circumvented, or thwarted by a rigid construction." Thus, the Court adopted the *Furgatch* "reasonable minds could differ" test. 160 Or.App. 406, 982 P.2d 3, 10 (Or.Ct.App.1999). "The purpose," said the Court, "is not to search for magic words—which careful drafters can, as in this case, usually avoid—but to find the essential message that the publication communicates to the reader. In doing this, the context of the publication—particularly whether or not it came in the midst of a contested election campaign—n play a role in determining how the reader would understand it and, thus, what its message is." *Id.*

In *Osterberg v. Peca*, 12 S.W.3d 31, 52 (Tex.2000), the Osterbergs, aggrieved at a ruling by Judge Peca, donated $34,200.00 to the campaign of his opponent in the subsequent election, and paid for a television advertisement which consisted of the following text: "CONSIDER THIS: Judge Peca was chosen by his peers El Paso's outstanding jurist; He graduated Summa Cum Laude; He worked to reduce his docket for over seven years; IF THAT'S ENOUGH, VOTE

FOR HIM. [next screen] But if you want ONE who understands: The Courthouse exists for the people . . . etc. BRING THE COURTHOUSE BACK TO THE PEOPLE! VOTE FOR HIS OPPONENT and remove HIM if he fails the will of the people!" The Texas Court refused to accept the contention that the *Buckley* test required the application of a rigid standard, noting that while *Buckley* restricted "express advocacy" to "spending that is unambiguously related to the campaign of a particular federal candidate" and to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,' " *Id.* at 44 n. 52, the United States Supreme Court in *MCFL* had stepped beyond the rigid test of *Buckley* by stating that a message can be "marginally less direct" than the examples listed in *Buckley* so long as its essential nature "goes beyond issue discussion to express electoral advocacy." *See MCFL*, 479 U.S., at 249.

The *Osterberg* Court also observed that the descriptions given in *Buckley* and *MCFL*, "do not give unambiguous answers to the myriad situations that arise." *Id.*, 12 S.W.3d, at 52, citing *Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1186 (7th Cir.), *cert. denied*, 525 U.S. 873, 119 S.Ct. 172, 142 L.Ed.2d 140 (1998) for that same observation.

VII. THE RESPECTIVE POSITIONS OF THE PARTIES SUB JUDICE

The Chamber contends that this court must employ the "magic words" test to this dispute *sub judice*, a standard, says the Chamber, which has been applied by the majority of other jurisdictions which have had the opportunity to address this question. So long as the words used in Buckley's footnote 52 are avoided, says the Chamber, political speakers avoid regulation under any circumstances. During oral argument this court posed a number of hypotheticals to counsel for the

Chamber seeking to determine the Chamber's perspective on the scope of *Buckley*. In response to each of the court's hypotheticals, Chamber's counsel responded that unless the advertisements contained one of the eight magic words appearing at *Buckley*'s footnote 52, the advertisements should not be construed as examples of express advocacy.[13]

In contrast, the State of Mississippi argues that the court should not leave common sense at the doorstep when it considers these matters, and that the definition of "express advocacy" should not require the court to be blind to what all "others can see and understand." The "magic words" approach, says the State of Mississippi, creates a large loophole which would allow all forms of organizations inside and outside of Mississippi to spend unlimited funds on commercials which unambiguously support candidates, with no transparency regarding the source of the funding. The Chamber, says the State of Mississippi, should not be permitted to take refuge in the "magic words" approach simply by cleverly omitting from the commercials in question the specific words listed at footnote 52 of the *Buckley* decision. In summary, the State is concerned that persons or organizations will surreptitiously advocate the election or defeat of a named candidate but avoid legitimate government

---

[13] During oral argument this court asked plaintiff's counsel whether either of the following instances would offend the express advocacy test:

> (1) a narration of the favored candidate's qualifications, a picture of the favored candidate along side the opponent with a line drawn through the picture of the opponent, all superimposed over people standing in what appears to be a voting line; and (2) an advertisement identical to one paid for and run by a specific candidate in which the candidate merely states a qualification while the independent ad simply omitting the words "vote for me" contained in the candidate's ad. Counsel responded that neither of these examples contained express advocacy under the bright line standard of *Buckley*. Thus, plaintiff's counsel sees no crack in the express advocacy test, unless the ad contains "magic words."

regulation by simply omitting "magic words" of advocacy. *See Iowa Right to Life Comm., Inc. v. Williams,* 187 F.3d 963, 970 (8th Cir.1999) (commenting on the State of Iowa's position in the *Williams* case).

VIII. ANALYSIS

Express advocacy is a very narrow class of election-related speech that in "explicit words" or by "express terms advocates the election or defeat of a clearly identified candidate." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 248-49, 107 S.Ct. 616, 623, 93 L.Ed.2d 539 (1986). In contrast to express advocacy, issue advocacy is the discussion of issues and candidates' positions on those issues without expressly advocating a candidate's election or defeat. The United States Supreme Court has recognized that issue advocacy sometimes may influence the election or defeat of particular candidates, but that does not convert it into express advocacy. Issue advocacy is protected by the First Amendment and can be subjected to no regulation, regardless of its effect on an election. *See MCFL,* 479 U.S., at 257 n. 10. So, the question to be resolved by this court is whether the advertisements at hand constitute merely issue discussion, or whether they expressly advocate for the election of a particular candidate. A court analyzing whether a given statute comports with the First Amendment must hesitate before "imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems." *Denver Area Education Telecommunications. Consortium, Inc. v. F.C.C.,* 518 U.S. 727, 116 S.Ct. 2374, 2385, 135 L.Ed.2d 888 (1996).

This court, in opposition to the Chamber's urgings, declines to strictly limit express advocacy to the "magic words" of *Buckley*'s footnote 52. As *Furgatch* correctly observed, *Buckley*'s footnote 52 does "not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." *Furgatch,* at pages 862-63.

Further, and even more importantly, the United States Supreme Court itself, in this court's eye, in *MCFL* determined to move beyond the rigid, overly simplistic "magic words" test of *Buckley*. In *MCFL*, the Court seemingly moved away from a rigid, talismanic application of *Buckley* 's footnote 52 to an "essential nature" inquiry, as the Court found express advocacy even though the communication at issue was, "marginally less direct than 'Vote for Smith'," one of the "magic words" contained in footnote 52 of the *Buckley* opinion.

Whether examining the advertisements at hand under the "essential nature" test of *MCFL*, or under *Furgatch*'s "no other reasonable interpretation" test, this court finds that the advertisements at issue provide explicit directives to vote for the named candidates. These advertisements simply cannot be regarded as mere discussions of public issues. Aired [14] at the very time statewide judicial elections were being conducted in Mississippi, the advertisements contain no true discussion of issues. While the advertisements mention "victims rights" and a "common sense judicial philosophy," the advertisements present no elaboration of these points. Instead, while providing only the background and experience of each candidate, the advertisements repeatedly insert the candidates' names between qualification assertions and each advertisement concludes with an emphatic phrase obviously designed to exhort support for the candidates' election to the Mississippi Supreme Court. Although the express words "vote for the candidate" do not appear anywhere in the advertisements, no reasonable viewer would construe the advertisements otherwise. The viewer sees a sleek, well

[14] While timing itself is no talisman of express advocacy, it is a useful element in the court's overall consideration, just as it was in *MCFL*, where the Supreme Court noted that the 1000,000 copies of the "Special Edition" were prepared for dissemination during the September 1978 primary elections.

prepared advertisement, just as a candidate's campaign staff might prepare.

Further, these advertisements are virtually the same as the advertisements being aired by the candidates themselves. The advertisements repeat the touted candidates' names in the very same manner as the candidates own advertisements which exhort the viewing public to vote for the named candidates. In this court's view, a finding of any use of "magic words" becomes unnecessary when an advertisement clearly champions the election of a particular candidate as the person who will use common sense, ensure prompt adjudication of death penalty cases and uphold victim's rights.

The advertisements display a web site, *www.Litigation-Fairness.org*. Significantly, when accessed, the web site contains a link entitled "Mississippi Candidate Information." The link ultimately leads to web pages which exhort the public's support for the election of two of the named candidates, Justice Kay Cobb and Judge Keith Starrett.

True issue advocacy invigorates debate on many issues such as the environment, civil rights, welfare and education, and other matters which, due to their nature, may name candidates who are either supportive of, or contrary to a particular issue. Also critical in the overall calculus, however, is the necessity of having legislation which is effective and capable of informing the public, while condemning abuse of the special status given to true issue advocacy. Ever seeking to be vigilant for the protection of true issue advocacy, this court concludes that legitimate issue advocacy is not before the court today, and that this ruling will not have a chilling effect upon those anxious to exercise their First Amendment political speech rights.

IX. CONCLUSION

Therefore, this court finds the advertisements in question contain express advocacy, and are offensive under *Buckley*

and *MCFL*. This court is persuaded that these advertisements do not attempt to discuss issues. Rather, the advertisements offer thinly veiled exhortations to support the campaigns of the aforesaid candidates, a plain, clever attempt to avoid the reach of the Mississippi reporting and disclosure laws by eliminating those words listed at footnote 52 of *Buckley*.

Accordingly, this court hereby denies the request of the Chamber of Commerce of the United States of America for declaratory relief from any subjection to the Mississippi laws governing independent expenditures. Instead, the court finds that the advertisements at issue which favor four specific candidates for the popularly elected Mississippi Supreme Court expressly advocate their elections and, as such, the Chamber must answer under Mississippi's contribution limits and reporting requirements as found at Mississippi Code Annotated §§ 23-15-801 *et seq*.

The Court shall enter a separate judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure.

IN THE CHANCERY COURT
OF HINDS COUNTY, MISSISSIPPI

No. [G-2000-2128 S/2]

FRANK G. VOLLOR

Plaintiff

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE MS; WXVF-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV-TV, JACKSON, MS; WLB-TV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; and WCBI-TV, COLUMBUS, MS

Defendants

APPLICATION FOR TEMPORARY RESTRAINING ORDER

COMES NOW the Plaintiff, Frank G. Vollor, and applies for a Temporary Restraining Order against the above-named Defendants, and in support of his application for a Temporary Restraining Order would show unto this Court the following:

I.

The Application involves the contracting between the Chamber of Commerce of the United States of America, hereinafter referred to as "Chamber", and the other defendant television stations. The defendant television stations have as their principal place of business the Central Judicial District of the State of Mississippi, wherein an election is being contested for a seat on the Mississippi Supreme Court between Jim Smith and Frank Vollor, your Plaintiff herein.

In the absence of immediate equitable relief there will be irreparable harm to the Plaintiff. With every transmission or

communication of television advertising paid for by the Chamber, public opinion is being affected and voting decisions by the viewers of those illegal advertisements are being determined. The election day is November 7, 2000.

II.

The television ads on behalf of Jim Smith by the Chamber of Commerce of the United States of America are indirect expenditures which are subject to the contribution limits and reporting requirements of Mississippi Code Annotated, Section 23-15-801. (See the opinion of Honorable Henry T. Wingate, which is attached.) The Chamber of Commerce of the United States of America has violated the spending limit provision of the Mississippi Election Laws which cap individual expenditures at $5,000.00 per person or $1,000.00 per corporation. The Chamber of Commerce of the United States of America is a non-profit corporation which operates in Washington, D.C.

III.

That upon a further evidentiary hearing for a preliminary injunction, there is an overwhelming likelihood that this Court will also find these expenditures illegal and, thus, grant the relief sought herein. On November 2, 2000, the United States District Court, U.S. District Judge Henry T. Wingate, filed its Memorandum Opinion and Order. That Order ruled that the advertisements on behalf of Judge Jim Smith clearly express advocacy and are offensive under applicable law, *Buckley v. Valeo,* 424 US 1, 96 Supreme Court, 612 (1976). Judge Wingate found that the Defendant, Chamber, was subject to Mississippi Election Laws concerning television ads communicated in this particular Supreme Court race between the Plaintiff and Judge Jim Smith.

IV.

The Plaintiff, Frank G. Vollor, is asking this Court for the immediate enforcement of Mississippi Election Laws. The relief sought is narrowly crafted in order to achieve the proper legal result and constitutes the least restrictive means to bring the Chamber of Commerce of the United States of America into compliance with Mississippi law and enjoin its continued violation of Mississippi Election Law. Those television and communication defendants who contracted with the Chamber or its agents, servants, and employees to communicate this illegal advertising should also be enjoined from accepting these ads or communicating these ads in any way to the public by any method of transmission.

V.

This Court should immediately enter its Order enjoining the Chamber of Commerce of the United States of America and all other defendant television stations from airing those television commercials being aired and paid for by the Chamber in support of Justice Jim Smith or against the election of Judge Frank Vollor. This Order should go into effect immediately, without further delay or immediate and irreparable injury, loss, and damage will result to Frank G. Vollor, your Applicant herein, before the adverse parties or their attorneys can be heard in opposition. (See Affidavit of Frank G. Vollor, which is attached.)

VI.

The Defendant, Chamber, is the cause of this emergency time constraint because of its failure to comply with Mississippi law and then its application to the United States District Court for Declaratory Relief, which was just issued on November 2, 2000, as shown by attached exhibit.

VII.

The Affidavit of the Attorney for Applicant is attached hereto and made a part hereof, as required by Rule 65 MRCP.

VIII.

There will be no loss to the Chamber, the primary Defendant, and there can be no loss to the communication defendants for being restrained from running ads not in compliance with or in violation of Mississippi Election Laws. In any event, only a minimal bond should be required.

IX.

For these and other reasons orally presented to the Court, the within relief should be granted without notice.

RESPECTFULLY SUBMITTED, this the 3rd day of November, 2000.

/s/ _____
PAUL KELLY LOYACONO

RULE 65 AFFIDAVIT OF ATTORNEY

STATE OF MISSISSIPPI

COUNTY OF WARREN

1. I, Paul Kelly Loyacono, am attorney for the Plaintiff in the Application of Frank G. Vollor for a Temporary Restraining Order.

2. The list of television stations in my possession has only the address and general manager and I do not know the attorney for the Chamber of Commerce of the United States of America or its address, except Washington, D.C.

3. That the Applicant, Frank G. Vollor, furnished me with the Order of this date signed by U.S. District Court Judge Henry T. Wingate, who found that the Chamber of Commerce of the United States of America was subject to the election laws of this state.

4. That there is no time to notify all Defendants, as the Order of Judge Wingate was not signed until this day, and it was the Chamber of Commerce of the United States of America which brought the Action for Declaratory Relief in his Court. There are remaining only two (2) business days until the election of November 7, 2000.

5. Notice should not be required because this immediate relief is made necessary by the failure of the Chamber of Commerce of the United States of America to abide by Mississippi Election Laws. The Chamber of Commerce of the United States of America had filed for Declaratory Judgment on the question of whether it was subject to Mississippi Election Laws, and it chose the time and forum for that decision, which was just rendered this day by the U.S. District Court for the Southern District of Mississippi.

6. The cause of there not being adequate time for notice is only the fault of the Defendant, the Chamber of Commerce of the United States of America, and at no fault of the Plaintiff, Frank G. Vollor, or his attorney.

WITNESS MY SIGNATURE, this the 2nd day of November, 2000.

/s/ _____
PAUL KELLY LOYACONO

IN THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

NO. G2000-2128 S/2

FRANK G. VOLLOR,

Plaintiff,

VS.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE, MS; WXVT-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV-TV, JACKSON, MS; WLBT-TV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; AND WCBI-TV, COLUMBUS, MS,

Defendants.

TRANSCRIPT OF PROCEEDINGS HELD IN THE ABOVE STYLED AND NUMBERED CAUSE BEFORE THE HONORABLE WILLIAM H. SINGLETARY, CHANCELLOR, ON THE 3RD DAY OF NOVEMBER, 2000.

* * * *

Counsel for Plaintiff:

Now, just for the record and for the Court to hear our side of it, I think it's clear that the only reason we're here at the last minute is because of the Chamber's continuing action to say that it is not subject to Mississippi law. To support that action, they chose the forum. They asked for declaratory relief in the U.S. District Court some two weeks ago. There was nothing, I guess, that could be done since they had raised

an issue that they had some free speech exclusion from Mississippi law, some privilege, etc., etc. It was only yesterday that the U.S. District Court, Judge Henry Wingate, filed his ruling, which is attached as a part of our application for a temporary restraining order, where he finds that such is not the case, that what they are doing is just not even real thinly veiled, but—those words were used in it somewhere—these advertisements that we're complaining of by the Chamber do not discuss issues. They are merely campaign ads on behalf of Jim Smith or against Frank Vollor, the only two candidates in this election.

* * * *

Mr. Pyle: Excuse us just a second, Your Honor.

(PAUSE IN THE PROCEEDINGS WHILE MR. LOYACONO AND MR. PYLE CONFERRED BRIEFLY)

Counsel for Plaintiff: Your Honor, since the Court did require us and asked us to notify Mr. Wallace, Mr. Wallace did make an announcement to the Court that he was appearing specially only for some limited purposes. Now, Mr. Pyle has pointed out rightfully that special appearances under the Mississippi Rules of Civil Procedure are limited only for the purpose of jurisdictional protests. So if he's going to argue as to the merits of this case, then I think it is necessary that he--and the Chamber, of course, him acting for the Chamber--accept the jurisdiction of this Court, not waltz in, be able to tiptoe around and argue merits but say, Oh, we're really not here. So if he's going to argue as to merits, anything but jurisdiction, then I think the Chamber is required to accept the jurisdiction of this Court over it.

* * * *

Counsel for the Chamber:

I do want to say that it has never been the position of the Chamber of Commerce of the United States that it is not subject to Mississippi law. It has always been the position of the Chamber of Commerce that it is in compliance with Mississippi law. That is what we have argued before Judge Wingate, and that is what we argue to the Court today. Although Mr. Loyacono has referred to the advertisements before the Court as being illegal, I do not see any allegation in his application nor did I hear any statement in his argument in what way they are illegal. There is a suggestion that we have breached the contribution limits. What Judge Wingate found yesterday is that these advertisements constitute express advocacy. Express advocacy is part—excuse me, Your Honor—of the definition of independent expenditure under the statute. And for the Court's information, that definition is found at Section 23-15-801(j). Assuming that Judge Wingate's opinion is correct, that these advertisements do constitute independent expenditures, they are in no way illegal. There is no limit on the amount of money that can be spent on independent expenditures in Mississippi. None whatsoever. There are certain reporting requirements that go along with independent expenditures, if that's what they are, but I have heard no argument from counsel as to what reporting requirements, if any, the Chamber may have breached. In fact, as we read the statute, we have not breached any reporting requirements. No report is due until January the 10th, as we read the statute. So there's nothing illegal about the ads. There have been no contributions made, and there is nothing that I've heard that suggests that anything is illegal.

* * * *

Judge Wingate has issued an opinion. He has not issued a judgment as of half an hour ago when I called over there. The matter is still before Judge Wingate.

* * * *

And my last point, Your Honor, is: If I'm wrong about Mississippi law, if I'm wrong about the jurisdiction of this Court, if I'm wrong about the standing of Judge Vollor to be here in the first place as opposed to over in front of Judge Wingate, then we come squarely to the First Amendment of the Constitution of the United States, which quite plainly prohibits the restraint of speech except in cases such as the movement of troops, ships, and great public necessity. The issue of whether a campaign ad funded by an illegal contribution can be enjoined, that has been litigated.

* * * *

And in the case of the *Republican Party of Florida vs. Florida Election Commission,* the court quite squarely held that, "We conclude the issuance of an injunction under such circumstances constitutes an unconstitutional prior restraint of speech. Our freedom of speech is much too important to permit such prior restraint under the circumstances."

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

Cause No. G-2000-2128 S/2

FRANK G. VOLLOR,

Plaintiff,

vs.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE, MS; WXVT-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV-TV, JACKSON, MS; WLBT-TV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; AND WCBI-TV, COLUMBUS, MS,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

THIS CAUSE is before the Court on Plaintiff's Motion for Temporary Restraining Order. Having reviewed the motion and Defendant's opposition to such, the Court is of the opinion that the motion is well taken and is, therefore, granted.

The court has reviewed all relevant filings, all relevant case law, and has in fact held hearing on Plaintiffs' Motion. Based upon this information, this Court is satisfied that a Temporary Restraining Order is within the interest of equity. This Court finds that Plaintiff will be irreparably and immediately harmed in the absence of immediate equitable relief by this Court. The illegal television advertisements of the Chamber of Commerce of The United States of America (hereinafter "Chamber") clearly support the opposing candidate in the Central District election for the Supreme Court of

Mississippi. These advertisements clearly affect public opinion and voting decisions, resulting in an immediate and irreparable harm to Plaintiff. This harm to Plaintiff will not be remedied by the imposition of criminal fines and charges in accordance with the election status. Therefore, Defendants are incorrect in their assertion that this Court may not restrain an action which may be criminally punished at a later date. Criminal punishment is not the purpose of this Court; instead, this Court's purpose is to halt the harm done to the Plaintiff, immediately before further harm occurs.

Defendant Chamber further asserts that it is not subject to this Court's jurisdiction as it is a corporation headquartered in Washington. However, the United States Supreme Court has clearly held that a corporation is subject to personal jurisdiction in a state in which it is "doing business." Although the Chamber is a non-profit organization, it is clearly "doing business" in Mississippi as established by law. In fact, the Chamber has involved itself intricately in the most important of Mississippi business, the election of its public officials. Therefore, it is clear that the Chamber has impliedly consented to Mississippi jurisdiction. Finally, Defendants argue that this Court should follow the decision of the District Court of Appeal of Florida in Republican Party of Florida, et. al v. The Florida Elections Commission, et. al, 658 So. 2d 653 (1995). This Court has considered this case and finds it to be distinguishable from the case at hand. In this case the Florida Court found that the issuance of an injunction was an unconstitutional prior restraint of speech as the court was required to "analyze the substance and content of the proposed communication, not just make a factual determination as to the amount of funds expended." 658 So. 2d 653, 656 (1995). In the case at hand, however, this Court is simply being asked to "make a factual determination as to the amount of funds expended." Therefore, the issuance of an injunction in this case is not an unconstitutional prior restraint of speech.

The television advertisements on behalf of Jim Smith by the Chamber are indirect expenditures which are subject to the contribution limits and reporting requirements of Mississippi Code Annotated, Section 23-15-801. Chamber of Commerce of the United States of America v. Michael Moore, Attorney General, State of Mississippi, Eric Clark Secretary of State, State of Mississippi, Civil Action No. 3:00-cv-778WS (S.D. Miss. 2000). The Chamber has violated the spending limit provision of the Mississippi Election Laws which cap individual expenditures at $5,000.00 per person or $1,000.00 per corporation. The relief sought by Plaintiff is narrowly crafted in order to achieve the proper legal result and is the least restrictive means of enforcement of the applicable laws.

Therefore, it is ordered that each of the Defendants, their agents, servants, employees, attorneys, or those in active concert with them, are hereby enjoined from contracting to transmit or transmitting any television advertisement, which is paid for or produced by the Chamber of Commerce of The United States of America, its agents, servants, or employees, concerning the Central District election for the Supreme Court of Mississippi between Jim Smith and Frank G. Vollor.

This Order shall take effect and be binding upon the filing of a bond in the amount of $1,000.00 and shall expire ten (10) days after entry or after further order of this Court, whichever is sooner.

SO ORDERED, ADJUGED, AND DECREED THIS the 3rd day of November, 2000.

/s/ _____
CHANCELLOR WILLIAM HALE SINGLETARY

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

No. [2000-M-01839]

IN RE: CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner.

MOTION FOR STAY OF PROCEEDINGS
PENDING DISPOSITION OF PETITION
FOR INTERLOCUTORY APPEAL

Petitioner Chamber of Commerce of the United States of America ("the U.S. Chamber") has filed this day its petition for interlocutory appeal by permission or, in the alternative, for writ of mandamus or prohibition ("the petition"). Petitioner respectfully moves this Court, pursuant to M.R.A.P. 5(e) and 8(c), for a stay, pending resolution of the petition, of the injunctive relief ordered by the Chancery Court of the First Judicial District of Hinds County in its order dated November 3, 2000, requiring petitioner to cease all advertisements concerning Judge Frank G. Vollor and Justice Jim Smith.

In support of this motion, petitioner would show unto the Court the following:

A. Facts Relevant To The Need For A Stay Of All Proceedings

This fall, the U.S. Chamber has independently sponsored a series of television advertisements concerning candidates for judicial office in several states. As a part of that effort, on

October 17, 2000, the U.S. Chamber began airing television advertisements in Mississippi to inform the public about the experience of certain candidates for the Mississippi Supreme Court regarding particular issues of public importance, such as the administration of criminal law.

The Attorney General and Secretary of State believed that these expenditures subjected the U.S. Chamber to the reporting requirements of Miss. Code Ann. § 23-15-801 *et seq*. The U.S. Chamber disagreed and filed suit in federal court seeking a declaration that four of the advertisements were not "express advocacy" under Buckley v. Valeo, 424 U.S. 1 (1976), and therefore were not subject to state regulation. Following an expedited hearing, Judge Wingate of the Southern District of Mississippi disagreed. He held that the four advertisements at issue were express advocacy, and so were outside Buckley's protections from state regulation. See United States Chamber of Commerce v. Moore, No. 3:00-CV-778WS, memorandum opinion at 27 (S.D.Miss. Nov. 2. 2000).

On November 3, Judge Frank G. Vollor obtained the present temporary restraining order forbidding the broadcast of the U.S. Chamber's advertisements concerning either his candidacy or that of his opponent, Justice Jim Smith of the Supreme Court. His application to the Chancellor is attached to the petition as Exhibit A. The Chancellor's temporary restraining order is attached to the petition as Exhibit B. The U. S. Chamber's petition for interlocutory appeal and stay pending appeal is attached to the petition as Exhibit C.

B. The Standard for Granting a Stay

This Court has authority to grant a stay of all proceedings pending an interlocutory appeal. M.R.A.P. 5(e). The standard for granting a stay pending appeal requires that:

> (A) the applicant make a strong showing that he is likely to succeed on the merits of the appeal; (B) the

appellant establish that unless a stay is granted he will suffer irreparable injury; (C) no substantial harm will come to other interested parties; (D) a stay would do no harm to the public interest.

Board of Trustees of the Jackson Public School District v. Knox, 638 So.2d 1278, 1281 (Miss. 1994) (quoting Official Comment to Rule 62); *see* M.R.A.P. 8(c); M.R.C.P. 62(c); M.R.C.P. 62(g).

These factors are not to be applied in a rigid, mechanical fashion. *United States* v. *Baylor University Medical Center,* 711 F.2d 38, 39 (5th Cir. 1983) (interpreting identical federal rule). Rather, there is a "sliding scale" approach to the four factors—where an especially strong showing is made on one of the factors, a lesser showing is required on the others. *Id.; Ruiz v. Estelle.* 650 F.2d 555, 565 (5th Cir. 1981); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).[1]

Specifically, a finding of "likelihood of success on the merits" does not require a mathematical probability of reversal. *Ruiz, supra,* 650 F.2d at 565. Rather, this first consideration weighs heavily in favor of a stay where the appeal raises questions "so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Holiday Tours, supra,* 559 F.2d at 844.

C. The factors as applied in this case

As set forth more fully in the petition, the petitioners have strong support for their argument that the Chancellor's

---

[1] This Court conducts a de novo determination of the propriety of a stay pending appeal, even where the trial judge has considered, and denied, a similar request for stay. *Knox, supra.* This is appropriate, since the power to grant a stay pending appeal is vested separately and concurrently in both the trial courts under M.R.C.P. 62(c) and this Court under M.R.C.P. 62(g) and M.R.A.P. 8(c).

injunctive relief should be overturned. It is plainly a prior restraint violating the First Amendment. In Republican Party of Florida v. Florida Elections Commission, 658 So.2d 653 (Fla. Dist. Ct. App. 1995), the Court held that, even where an advertisement was financed by illegal campaign contributions, its broadcast could not be enjoined. The U.S. Chamber will suffer immediate and irreparable harm if not allowed to advertise regarding candidates for judicial election. "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Hohe v. Casey, 868 F.2d 69, 72, 73 (3d Cir. 1989). "[T]he harm to plaintiffs from the infringement of their rights under the First Amendment clearly outweighs any purported interest of the defendant." *ACLU v. Reno,* 31 F.Supp.2d 473, 497-98 (E.D.Pa. 1999).

WHEREFORE, PREMISES CONSIDERED, petitioner respectfully moves this Court to stay the TRO entered by the Chancery Court, as well as all further proceedings in that Court, pending resolution of the petition.

Respectfully submitted,

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

By: /s/ _____

MICHAEL B. WALLACE (MSB #6904)
CHRISTOPHER R. GREEN (MSB #99593)
PHELPS DUNBAR, L.L.P.
Suite 500-SkyTel Centré North
200 S. Lamar Street
Post Office Box 23066
Jackson, MS 39225-3066
Telephone: (601) 352-2300

IN THE SUPREME COURT
OF MISSISSIPPI

No. 2000-M-01839

IN RE: CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA

ORDER

This matter has come before a panel of the Court composed of Presiding Justice Banks and Justices McRae and Waller, on Motion for Stay of Proceedings Pending Disposition of Petition for Interocutory Appeal filed by the Chamber of Commerce of the United States of America. Having considered the motion, the panel concludes that it is without merit and should be denied.

IT IS THEREFORE ORDERED that the Motion for Stay of Proceedings Pending Disposition of Petition for Interocutory Appeal filed by the Chamber of Commerce of the United States of America in this cause be and the same is hereby denied.

SO ORDERED, this the 3rd day of November, 2000.

/s/ _____
FRED L. BANKS, JR.,
Presiding Justice,
For The Court

IN THE CHANCERY COURT OF
HARRISON COUNTY, MISSISSIPPI

CAUSE NO._____

OLIVER E.DIAZ,JR.,

Plaintiff,

VERSUS

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA;
WLOX-TV, GULFPORT/BILOXI, MS;
WDAM-TV, HATTIESBURG, MS,

Defendants.

TEMPORARY RESTRAINING ORDER

CAME the Applicant, Oliver E. Diaz, Jr., through counsel and by affidavit as required by Rule 65 MRCP, and the Court, having heard the argument of counsel and being advised in the premises, including the affidavits of the Applicant and his counsel, finds that the relief sought should be granted. The Court find, orders and adjudges as follows:

1. The Court finds that it has jurisdiction for the purposes of a Rule 65 motion.

2. The Court notes that Plaintiff's counsel contacted this judge on Saturday afternoon and that the Court, having heard the ex parte motion, was able to contact 3 of the district's four Chancellors and discuss the merits of the application; further, the Court believes there is sufficient merit to the injunction application to issue this order.

3. The Court grants this order without notice because there is insufficient time to notify all parties and schedule a

hearing for the following reasons: Plaintiff has alleged a failure to comply with Mississippi Election Laws by the Defendant, the Chamber of Commerce of the United States of America; Plaintiff has alleged litigation in federal courts to decide the question of whether Defendant Chamber of Commerce was subject to Mississippi Election Laws regarding contributions was not decided by the Court of its choosing until November 2, 2000, only two business days prior to the election.

4. The Court finds that Plaintiff has alleged that irreparable and immediate harm would accrue to Oliver E. Diaz, Jr., as his campaign would be subject to unfair television advertisements in support of his opponent, Keith Starrett, contrary to Mississippi Election Laws due to the shortness of time remaining before the election and his inability to lawfully match the financial contributions of television advertising of the Chamber of Commerce of the United States of America on behalf of his opponent.

IT IS THEREFORE, ORDERED AND ADJUDGED AS FOLLOWS:

1. ORDERED AND ADJUDGED, that each of the Defendants, their agents, servants, and employees are hereby enjoined from transmitting any television advertisement which is paid for or produced by the Chamber of Commerce of the United States of America, its agents, servants, or employees, in support of Keith Starrett and against Oliver E. Diaz, Jr., concerning the Southern District election for the Supreme Court of Mississippi. Specifically, Separate Defendant WDAM-TV, Hattiesburg, Ms., is enjoined only as to television transmission into Harrison County, Hancock County, and Stone County, all within this Court's district.

2. ORDERED AND ADJUDGED, that the Applicant is hereby required to post with this Court a bond in the amount of One Thousand Dollars ($1,000.00), and this Order shall be

immediately binding on the parties on the 4th day of November, 2000, as of 2:30 p.m., and service upon each Defendant may be had herein by mail, telephone, facsimile, or by actual notice otherwise.

3. ORDERED AND ADJUDGED, that the Court sets this matter for review on Monday, November 6, 2000, at 1:30 p.m., at the Gulfport Courthouse, should any Defendant feel aggrieved by this injunction; however, unless therein set aside, this Order shall expire ten (10) days after entry or after further Order of this Court pursuant to Rule 65.

SO ORDERED, this the 4th day of November, 2000, at 2:30 p.m.

/s/ _____
CHANCELLOR

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI

[Filed November 5, 2000]

CAUSE NO. 2000-0204

BILLY JOE LANDRUM,

Petitioner,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, WDAM, WLOX, WLBT AND OTHER NEWS MEDIA,

Respondents.

VERIFIED COMPLAINT

COMES NOW, Billy Joe Landrum, and files this his VERIFIED COMPLAINT requesting the Court to enter a Temporary Restraining Order and upon final hearing, an injunction against the Respondents from airing any materials using the name of the Petitioner, Billy Joe Landrum, in commercials or other advertisements having been paid for by the Chamber of Commerce of the United States of America, and for just cause would most respectfully show unto this Honorable Court the following matters and facts, to-wit:

1. That the Petitioner is an adult resident citizen of the First Judicial District of Jones County, Mississippi, who is a candidate for the office of Justice of the Mississippi Supreme Court.

2. That the Chamber of Commerce of the United States of America is a corporation doing business in the First Judicial District of Jones County, Mississippi,

available for service of process by service upon their registered agents or their attorneys.

3. That the other Respondents are news organizations available for service of process by service upon their registered agents or their attorneys.

4. That the Chamber of Commerce of the United States of America has purchased political advertisements promoting an opponent of the Petitioner, said ads being in violation of § 23-15-1021 of the Mississippi Code, annotated as amended.

5. That the violation of said section has been found in an Opinion written by the Honorable Henry T. Wingate, Federal District Judge for the Southern District of Mississippi, Jackson Division.

6. That the election for which these advertisements were purchased, is scheduled for Tuesday, November 7, 2000, and unless this Court enters a Temporary Restraining Order, there will be immediate and irreparable injury, loss and damages to the Petitioner as a result of the instant advertisements being broadcast in violation of law.

WHEREFORE PREMISES CONSIDERED, Petitioner prays the Court will enter a Temporary Restraining Order, enjoining WDAM, WLOX, WLBT and other news mediums from printing, publishing or broadcasting any further advertisements which have been paid for by the Chamber of Commerce of the United States of America in which said advertisements use the name of the Petitioner, Billy Joe Landrum and further prays this Court set a hearing on the instant Petition, within ten days of the date of this Petition and further that the Court will set a reasonable bond in accordance with MRCP 65.

WITNESS MY SIGNATURE on this 5th day of November, 2000.

/s/ Billy Joe Landrum
BILLY JOE LANDRUM

STATE OF MISSISSIPPI
COUNTY OF JONES

PERSONALLY APPEARED before me, the undersigned authority in and for the said County and State, the within named BILLY JOE LANDRUM, the Petitioner in the above styled and numbered cause, who, having been first by me duly sworn, stated upon oath and made affidavit that all matters and facts charged in the above and foregoing Verified Complaint are, each and all, true and correct as therein stated.

/s/ Billy Joe Landrum
BILLY JOE LANDRUM

SWORN TO and subscribed before me, a Notary Public in and for said County and State, on this 5th day of November, 2000.

/s/ Kathy Brownlee
KATHY BROWNLEE
NOTARY PUBLIC

TUCKER BUCNANAN, P.A.
Thomas T. Buchanan—Bar #7033
Attorney at Law
P. O. Box 4326
Laurel, MS 39441
649-8000

SUPREME COURT OF THE UNITED STATES

Mr. Justice Antonin Scalia
Circuit Justice for the Fifth Circuit

No._____

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

FRANK G. VOLLOR, OLIVER E. DIAZ, JR.,
and BILLY JOE LANDRUM
Respondents.

SUPPLEMENT TO MOTION FOR EMERGENCY STAY OF A PRIOR RESTRAINT ON POLITICAL SPEECH

Petitioner hereby supplements the Motion for Emergency Stay of a Prior Restraint on Political Speech ("Emergency Motion") that it delivered to the Supreme Court on Saturday, November 4, 2000 (which motion may not be officially filed until Monday, November 6). This Supplement advises the Court that two other candidates for seats on the Mississippi Supreme Court have obtained *ex parte* orders essentially identical to the order granted to Judge Vollor on November 3, 2000. Accordingly, this Supplement seeks emergency relief against the two new prior restraints for the same reasons discussed in the Chamber's Emergency Motion, and names the candidates who obtained the new prior restraints as party respondents.

The *Ex Parte* Prior Restraint Obtained By Judge Diaz

1. On Saturday, November 4, the Chancery Court of Harrison County, Mississippi, acting *ex parte*, entered a Temporary Restraining Order against the Chamber and several television broadcasting stations that imposes a prior restraint on Chamber political advertisements "in support of Keith Starett and against Oliver E. Diaz, Jr., concerning the Southern District election for the Supreme Court of Mississippi." A copy of the TRO and of the application therefor are Exhibit 5 hereto.[1]

2. The Diaz Application (§ V.) describes the events leading to the Vollor prior restraint as "an identical proceeding," and states that the targeted ads are "virtually identical" to those enjoined by Judge Vollor. So far as appears, no further information about any particular Chamber ad was submitted in support of the Application, with the exception of a description of the "Judge Keith Starrett Advertisement" that appears at page 7 of the Memorandum Opinion of the Southern District (Exhibit ___ to the Chamber's Original Motion). The Chamber understands the prior restraint to encompass that ad, and any similar ads. Television station defendants similarly understand the prior restraint to require them to take down the Chamber's ads relating to either Judge Diaz or his opponent, Judge Starrett. The ads have been taken down because of the prior restraint.

4. Time does not permit the Chamber again to seek relief from the Mississippi Supreme Court, on which Judge Diaz sits. That Court's November 3 ruling denying the Chamber's attempt to stay the Vollor TRO as without merit demonstrates that an application with respect to the TRO obtained by Judge Diaz would be futile.

---

[1] The Application omits two of its exhibits. Exhibit A corresponds to the Memorandum Opinion that is included in Exhibit 3 to the Chamber's Emergency Motion. Exhibit B is the TRO obtained by Judge Vollor that is Exhibit 1 to the Chamber's Emergency Motion.

5. Judge Diaz is one of three candidates for the same seat. The Chamber believes it is likely that there will be a run-off election in that race, with the run-off vote to be held on November 21. The Chamber will run ads during the run-off period if permitted to do so.

6. The Chamber asks that the prior restraint obtained by Judge Diaz be stayed for the same reasons stated in its original Emergency Motion with respect to the November 3 TRO concerning the Vollor race. The Chamber is serving both its original Emergency Motion and this Supplement on Judge Diaz and has named him as a respondent.

The *Ex Parte* Prior Restraint Obtained By Judge Billy Joe Landrum

7. As this Supplement was being finalized, the Chamber was informed by telephone that yet another *ex parte* prior restraint against its political speech. The new TRO was obtained by Judge Billy Joe Landrum, who also is a candidate for a seat on the Mississippi Supreme Court. On information and belief, it was obtained in similar circumstances and imposes similar restraints to the TROs obtained by Judges Vollor and Diaz.

8. If a copy of that prior restraint can be obtained promptly, it will be attached hereto as Exhibit 6. Otherwise, it will be submitted later.

Conclusion

The two new prior restraints should be stayed for the same reasons stated in the Chamber's original Emergency Motion with respect to the November 3 TRO concerning the Vollor race. The Chamber is serving both its Emergency Motion and this Supplement on Judge Diaz and will serve Judge Landrum as soon as his counsel can be identified.

Respectfully submitted,

/s/ Jan Witold Baran
JAN WITOLD BARAN
THOMAS W. KIRBY
WILEY, REIN & FIELDING
1776 K St. N.W.
Washington, D.C. 20006
Ph. (202) 719-7062
Fx. (202) 719-7049
Home Ph. (301) 652-4970

Counsel for Petitioners

Of counsel:

MICHAEL B. WALLACE
PHELPS DUNBAR, LLP
Suite 5000 Sky Tel Centre
200 S. Lamar St.
Jackson, Mississippi 39225

November 5, 2000

IN THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

No. G2000-2137 S/2

WILLIAM A. PYLE,
A CITIZEN OF MISSISSIPPI,
Plaintiff,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE, MS; WXVT-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV-TV, JACKSON, MS; WLBT-TV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; WCBI-TV, COLUMBUS, MS; WLOX-TV, BILOXI; WDAM-TV, HATTIESBURG; WHLT-TV, HATTIESBURG; WTVA-TV, TUPELO; WLOV-TV, TUPELO; WMC-TV, MEMPHIS; WREG-TV, MEMPHIS; AND WPTY-TV, MEMPHIS
Defendants.

ORDER GRANTING PLAINTIFF'S MOTION
FOR TEMPORARY RESTRAINING ORDER

THIS CAUSE is before the Court on Plaintiff's Motion for Temporary Restraining Order. Having reviewed the motion, the Court is of the opinion that the motion is well taken and is, therefore, granted.

The Court has reviewed all relevant filings, all relevant case law, and has held hearings on a related case, but a case with different parties and issues. Based upon this information, including the Affidavit of the Plaintiff and his attorney, the Court is satisfied that a Temporary Restraining

Order Without Notice is within the interest of equity. The Court finds that this Plaintiff will be irreparably and immediately harmed in the absence of immediate equitable relief by this Court. The illegal television advertisements of the Chamber of Commerce of the United States of America (hereinafter "Chamber") clearly support certain judicial candidates throughout the State of Mississippi and clearly identify and intend to defeat certain other judicial candidates throughout the State of Mississippi.

This Court takes judicial notice of the fact that those judicial candidates being supported by the Chamber ads have publicly announced their opposition to these ads and have all asked that the Chamber no longer run these ads. These advertisements clearly affect public opinion and voting decisions, and thus result in an immediate harm to the Plaintiff, who seeks fair elections throughout the State, elections held in compliance with applicable Mississippi statute. This Plaintiff will not be remedied by the imposition of criminal fines and charges in accordance with election statutes, therefore, Defendants are incorrect in their assertion that this Court may not restrain an action which may be criminally punished at a later date. Criminal punishment is not the purpose of this Court; instead, this Court's purpose is to halt the harm done to the Plaintiff, immediately, before further harm occurs.

The Defendant, Chamber, is clearly doing business in the State of Mississippi by admittedly investing over $400,000.00 in television ads to this judicial campaign and otherwise. Further, the Chamber has impliedly consented to Mississippi jurisdiction, as well as actually committed itself to Mississippi jurisdiction by an appeal on the merits from a former order of this Court. The Court in this case finds that this is clearly instance where the Defendant, Chamber, is subject to Mississippi Election Laws as well as obviously and openly trying to influence the judicial elections of this state

by touting particular candidates and seeking the defeat of other candidates. That the candidates are few in number and are clearly identifiable. These expenditures are indirect expenditures which are subject to the contribution limits and reporting requirements of Mississippi Code Annotated Section 23-15-801. Chamber has admittedly violated the spending limits of that section, and while having taken the position that it might be subject to criminal prosecution, this Court finds that the relief sought by the Plaintiff is so narrowly crafted in order to achieve the proper legal result, and that it is the least restrictive means of enforcement of the applicable laws. The Court is further impressed by the fact that even the recipients of the Chamber ads have openly and clearly called for the Chamber to cease and desist running its ads.

THEREFORE, it is ordered that each of the Defendants, their agents, servants, employees, attorneys, or those in active concert with them, are hereby enjoined from contracting to transmit or transmitting any television advertisements which are paid for, produced, or furnished by the Chamber of Commerce of the United States of America, its agents, servants, or employees, concerning judicial elections within the State of Mississippi in November, 2000.

This order shall take effect and be binding immediately upon the filing of a bond in the amount of $100. and shall expire ten days after entry, or after further order of this Court, whichever is sooner.

SO ORDERED, ADJUDGED, AND DECREED, this the 6th day of November, 2000.

/s/ _____

CHANCELLOR WILLIAM HALE SINGLETARY

SUPREME COURT OF THE UNITED STATES

No. 00A406

CHAMBER OF COMMERCE OF THE UNITED STATES,
Applicant,

v.

FRANK G. VOLLOR

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the temporary restraining order granted by the Chancery Court of the First Judicial District of Hinds County, Mississippi, case No. G-2000-2128, issued on November 3, 2000, is stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

/s/ Antonin Scalia
Associate Justice of the Supreme
Court of the United States

Dated this 6th
day of November, 2000

SUPREME COURT OF THE UNITED STATES

No. 00A406

CHAMBER OF COMMERCE OF THE UNITED STATES,
Applicant,

v.

FRANK G. VOLLOR, OLIVER DIAZ, JR.,
AND BILLY JOE LANDRUM,

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the temporary restraining orders granted by the Chancery Court of Harrison County, Mississippi issued on November 4, 2000 and by the Chancery Court of the First Judicial District of Jones County Mississippi, issued on November 5, 2000, are stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

/s/ Antonin Scalia
Associate Justice of the Supreme
Court of the United States

Dated this 6th
day of November, 2000

IN THE CHANCERY COURT
OF HINDS COUNTY, MISSISSIPPI

No. G2000-2137 S/2

WILLIAM A PYLE, A CITIZEN OF MISSISSIPPI
Plaintiff

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE, MS; WXVF-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV.TV, JACKSON, MS; WLBTTV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; and WCBI-TV, COLUMBUS, MS; WLOX-TV, BILOXI; WDAM-TV, HATTIESBURG; WHLT-TV, HATTIESBURG; WTVA-TV, TUPELO; WLOV-TV, TUPELO; WMC-TV, MEMPHIS; WREG-TV, MEMPHIS AND WPTY-TV, MEMPHIS
Defendants

APPLICATION FOR TEMPORARY
RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

COMES NOW the Plaintiff, William A. Pyle, and applies for a Temporary Restraining Order against the above-named Defendants, and in support of his application for a Temporary Restraining Order would show unto this Court the following:

I.

The Application involves the contracting between the Chamber of Commerce of the United States of America, hereinafter referred to as "Chamber", and the various television stations throughout this state. The defendant television stations have as their principal place of business the

State of Mississippi, wherein a statewide election is being contested for seats on the Mississippi Supreme Court.

In the absence of immediate equitable relief there will be irreparable harm to the Plaintiff, as well as to other citizens of this state. With every transmission or communication of television advertising paid for by the Chamber, public opinion is being affected and voting decisions by the viewers of those illegal advertisements are being determined. The Plaintiff and countless other citizens will be harmed because the illegal advertisements by the Defendant, Chamber, adversely affect the Plaintiff's right as a citizen of the State of Mississippi and the United States of America to participate in a fair and impartial election process. The election day is November 7, 2000. The Plaintiff wishes only that the election laws of the Sovereign State of Mississippi be upheld, and enforced.

II.

This Court has jurisdiction over the parties for the purpose of this Petition for a Temporary Restraining Order. At least three (3) defendant television stations have their principal place of business in this district. The Chamber has appeared in this Court and later in the Mississippi Supreme Court appealing a former Order of this Court on the merits of this Court's rulings involving related but different issues. The Chamber has become subject to this Court's jurisdiction by admittedly doing business within this district and spending hundreds of thousands of dollars contracting with the defendant television stations in an illegal attempt to manipulate judicial elections through its own unregulated, unsolicited, and uncontrolled advertisements for or against judicial candidates for election to the Mississippi Supreme Court.

III.

The television ads on behalf of judicial candidates supported by the Chamber of Commerce of the United States of America are indirect expenditures which are subject to the contribution limits and reporting requirements of Mississippi Code Annotated, Section 23-15-801. (The opinion of Honorable Henry T. Wingate, which is made a part hereof by reference.) The Chamber of Commerce of the United States of America has violated the spending limit provision of the Mississippi Election Laws which cap individual expenditures at $5,000.00 per person or $1,000.00 per corporation.

IV.

That upon a further evidentiary hearing for a preliminary injunction, there is an overwhelming likelihood that this Court will also find these expenditures illegal and, thus, grant the relief sought herein. On November 2, 2000, the United States Distinct Court, U.S. District Judge Henry T. Wingate, filed its Memorandum Opinion and Order. That Order ruled that the advertisements on behalf of certain candidates clearly express advocacy and are offensive under applicable law, *Buckley v. Valeo*, 424 US 1. 96 Supreme Court, 612 (1976). Judge Wingate found that the Defendant, Chamber, was subject to Mississippi Election Laws concerning television ads for which it paid and which it produced. The Chancery Court of Hinds County granted a Temporary Restraining Order and, upon appeal, said Order was affirmed by the Mississippi Supreme Court. (Order is attached as an exhibit.)

V.

The Plaintiff, William A. Pyle, is asking this Court for the immediate enforcement of Mississippi Election Laws. The relief sought is narrowly crafted in order to achieve the proper legal result and constitutes the least restrictive means to bring the Chamber of Commerce of the United States of America

into compliance with Mississippi law and enjoin its continued violation of Mississippi Election Law. Those television and communication defendants who contracted with the Chamber or its agents, servants, and employees to communicate this illegal advertising should also be enjoined from accepting these ads or communicating these ads in any way to the public by any method of transmission.

VI.

The rights of your Petitioner, a citizen of Mississippi, and of all the candidates for election to the Mississippi Supreme Court are being immediately and irrevocably adversely affected. Even those candidates supported by the Chamber have clearly asked the Chamber to stop running its ads.

VII.

This Court should immediately enter its Order enjoining the Chamber of Commerce of the United States of America and all other defendant television stations from airing those television commercials being aired and paid for by the Chamber in support of or against any judicial candidates. This Order should go into effect immediately, without further delay or immediate and irreparable injury, loss, and damage will result to William A. Pyle, your Applicant herein, before the adverse parties or their attorneys can be heard in opposition. (See Affidavit of William A. Pyle. which is attached.)

VIII.

The Defendant, Chamber, is the cause of this emergency time constraint because of its failure to comply with Mississippi law and its declaratory action in U.S. District Court, a forum of its own choice and which in it was unsuccessful and lost on all litigated issues.

IX.

The Affidavit of the Attorney for Applicant is attached hereto and made a part hereof, as required by Rule 65 MRCP.

X.

There will be no loss to the Chamber, the primary Defendant, and there can be no loss to the communication defendants for being restrained from running ads not in compliance with or in violation of Mississippi Election Laws. In any event, only a minimal bond should be required.

XI.

For these and other reasons orally presented to the Court, the within relief should be granted without notice.

RESPECTFULLY SUBMITTED, this the 6th day of November, 2000.

/s/ _____
PAUL KELLY LOYACONO

RULE 65 AFFIDAVIT OF ATTORNEY

STATE OF MISSISSIPPI

COUNTY OF HINDS

1. I, Paul Kelly Loyacono, am attorney for the Plaintiff in the Application of William A. Pyle for a Temporary Restraining Order.

2. The list of television stations in my possession has only the address and general Manager; and Honorable Michael Wallace, the attorney for the Chamber of Commerce of the United States of America, has received telephonic notice of filing upon the filing.

3. There is no time to notify all Defendants, as the Order of Justice Scalia was not signed until this day, and it was the Chamber of Commerce of the United States of America which brought the Motion for Stay without hearing. The election is tomorrow, November 7, 2000.

4. Notice should not be required because this immediate relief is made necessary by the failure of the Chamber of Commerce of the United States of America to abide by Mississippi Election Laws. The Chamber of Commerce of the United States of America had filed for Declaratory Judgment on the question of whether it was subject to Mississippi Election Laws, and it chose the time and forum for that decision, which was just rendered November 2, 2000, by the U.S. District Court for the Southern District of Mississippi.

5. The cause of there not being adequate time for notice is only the fault of the Defendant, the Chamber of Commerce of the United States of America, and at no fault of the Plaintiff, William A. Pyle, or his attorney.

WITNESS MY SIGNATURE, this the 6th day of November, 2000.

/s/ _____
PAUL KELLY LOYACONO

SUPREME COURT OF THE UNITED STATES

No.00A411

CHAMBER OF COMMERCE OF THE UNITED STATES,
Applicant,

v.

WILLIAM A. PYLE,

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the temporary restraining order granted by the Chancery Court of the First Judicial District of Hinds County, Mississippi, case No. G2000-2137, issued on November 6, 2000, is stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

/s/ Antonin Scalia
Associate Justice of the Supreme
Court of the United States

Dated this 7th
day of November, 2000

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF
JONES COUNTY, MISSISSIPPI

[Filed Dec 4 2000]

No. 2000-0204-E

BILLY JOE LANDRUM,

Plaintiff,

v.

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, *et al.*

Defendants.

Notice of Appeal

By this notice, the Chamber of Commerce of the United States appeals to the Supreme Court of Mississippi against Billy Joe Landrum from the judgment signed by this Court and entered on the docket on November 5, 2000, granting a temporary restraining order.

Respectfully submitted,

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
Defendant

By: /s/ CHRISTOPHER R. GREEN

Michael B. Wallace (MSB #6904)
Christopher R. Green (MB # 99593)
Phelps Dunbar, L.L.P.
Suite 500, SkyTel Centré
200 South Lamar Street
P.O. Box 23066
Jackson, MS 39225-2300

Of Counsel:

BOBBY R. BURCHIFIELD
COVINGTION & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
Telephone: (202) 662-5350

JAN WITHOLD BARAN
WILEY, REIN & FIELDING
1776 K Street, NW
Washington, DC 29996
Telephone: (202) 719-7330

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

CAUSE NO. 2000—TS-02048

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Appellants,

Versus

BILLY JOE LANDRUM,
Applellee.

MOTION TO DOCKET AND DISMISS

COMES NOW the Honorable Billy Joe Landrum, hereinafter referred to as Appellee, by and through his attorney pursuant to MRAP 27(a), and files this his MOTION TO DOCKET AND DISMISS against the Chamber of Commerce of the United States of America, hereinafter referred to as Appellants, and for just cause would most respectfully show unto this Honorable Court the following matters and facts to-wit:

1. That on or about November 5, 2000, the Appellee files his VERIFIED COMPLAINT attached hereto as Exhibit "A" which sought a Temporary Restraining Order enjoining WDAM, WLOX, WLBT, and other news medias from printing, publishing, or broadcasting any further advertisements which had been paid for by the Appellants, in which the advertisements used the name of the Appellee. Thereafter, the Honorable Franklin C. McKenzie, Chancellor for the First Judicial District of Jones County, Mississippi, entered his Temporary

Restraining Order temporarily granting the relief requested, set bond in the amount of $500.00, and directed that a hearing be set on whether or not the Temporary Restraining Order should be made permanent on Wednesday, November 8, 2000, a copy of said Temporary Restraining Order being made a part hereof as though copied in full words and letters as Exhibit "B."

2. That on November 6, 2000, Associate Justice of the Supreme Court of the United States of America, Anthony Scalia, entered an ORDER staying the Temporary Restraining Order which had been entered by Chancellor McKenzie on November 5, 2000, a copy of said ORDER being attached hereto as Exhibit "C."

3. That the Appellants immediately notified Judge McKenzie by copy of the Order entered by Justice Scalia, and in compliance Chancellor McKenzie did not hold the hearing scheduled for Tuesday, November 7, 2000, nor did the Appellants appear for said hearing. Subsequent to November 7, 2000, with no further notice to the Trial Court or the Appellee, the Appellants filed their NOTICE OF APPEAL, appealing the Temporary Restraining Order directly to this Honorable Court.

4. That this Honorable Court has jurisdiction of appeals from "final orders," and the Temporary Restraining Order issued by Chancellor McKenzie is not a "final order."

WHEREFORE PREMISES CONSIDERED, Billy Joe Landrun moves the Court, that upon hearing hereon the Court will dismiss the Appeal of the Chamber of Commerce of the United States of America and allow the Trial Judge to enter a final order herein.

Respectfully submitted,

BILLY JOE LANDRUM

/s/ By: Thomas T. Buchanan
THOMAS T. BUCHANAN

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

CAUSE NO. 2000—TS-02048

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA

Appellants

Versus

BILLY JOE LANDRUM

Appellee

BRIEF IN SUPPORTS OF MOTION TO DOCKET AND DISMISS

In accordance with the MRAP 27(a), the Appellee respectfully submits this, his brief in support of his MOTION TO DOCKET AND DISMISS and would most respectfully show unto this Honorable Court that the instant appeal is outside the jurisdiction of this Honorable Court and in violation of MRAP 16, in that the instant appeal is not from a "final order" of a Trial Court.

STATEMENT OF THE FACTS

The Appellee filed a VERIFIED COMPLAINT on or about November 5, 2000, requesting the Chancery Court of the First Judicial District of Jones County Mississippi to issue a Temporary Restraining Order enjoining news medias from printing, publishing, or broadcasting certain advertisements paid for by the Appellants. The Temporary Restraining order was sought pursuant to MRCP 65 (b) and is temporary on its face, as well as by said rule. Subsequent to the issuance of the TEMPORARY RESTRAINING ORDER by the Chancellor,

the Appellants sought and received an ORDER from an Associate Justice of the Supreme Court of the United States of America, Anthony Scalia, which states.

> "IT IS ORDERED that the Temporary Restraining Orders granted by the Chancery Court of Harrison County, Mississippi, issued on November 4, 2000, and by the Chancery Court of the First Judicial District of Jones County, Mississippi, issued on November 5, 2000, are stayed pending the timely filing and disposition of a petition for a writ of certiorari . . . ."

Immediately after the issuance of Justice Scalia's ORDER on November 6, 2000, a copy of said Order was faxed to Chancellor Frank McKenzie and the Appellees. Although the Appellants now claim that the stay in question only stayed the Restraining Order and not the proceeding, the Appellants did not appear on November 8, 2000, at 9:00 a.m., as required by Chancellor McKenzie's Restraining Order. The Appellants herein allowed Judge McKenzie to believe that the stay issued by Justice Scalia was a stay of the proceedings by not appearing. The Appellee would also point out that the Order issued by Justice Scalia was issued by a Justice of the Supreme Court of the United States of America without the Appellants first exhausting their state remedies.

Although the Order of Justice Scalia is still in effect, the Appellants have now entered and perfected their appeal to this court from the original Temporary Restraining Order.

STATEMENT OF APPLICABLE LAW

Appellant Court Rule 16 states:

> (a) Jurisdiction of the Supreme Court. The Supreme Court shall have such jurisdiction as is provided by Constitution and Statute. All appeals from final orders of trial courts shall be filed in the Supreme Court and the Supreme Court shall assign cases, as appropriate, to the Court of Appeals.

Prior to MRAP 16, Section 11-51-3 of the Mississippi Code governed the Appeals to this Honorable Court when it stated:

> An appeal may be taken to the Supreme Court from any final judgment of a circuit or chancery court in a civil case, not being a judgment by default, by any of the parties or legal representatives of such parties; and in no case shall such appeal be held to vacate the judgment or decree.

The footnote to MRCP 65 specifically states that the Restraining Order issued by Judge McKenzie is not a final judgment, and at the beginning of page 76, the footnote states:

> In prior Mississippi injunctive relief practice, injunctions were divided into two functional categories—prohibitory injunctions and mandatory injunctions—and, further, into two durational subcategories—interlocutory and final. See > Miss. Code Ann. §§ 11-13-1 through -39 (1972); V. Griffith, Mississippi Chancery Practice, § 442 (2d ed. 1950). Rule 65 has no effect on or application to final, or permanent, injunctive relief; however, the rule divides what have been referred to interchangeably as "interlocutory," "temporary," or "preliminary" injunction (see V. Griffith, supra) into two subcatepries: preliminary injunctions, Rule 65(a), and temporary restraining orders, Rule 65(b). The latter may be issued ex parte without an adversary hearing in order to prevent an immediate, irreparable injury and are of limited duration—they typically will remain in effect for a maximum 20 days. On the other hand, Rule 65(a)(1) requires that notice be given to the opposing party before a preliminary injunction may be issued. Some type of a hearing also implicitly is required by subdivision (a)(2), which provides either for the consolidation of the trial on the merits with the preliminary injunction hearing, or the

inclusion in the trial record of any evidence received at the Rule 65(a) hearing. Furthermore, a preliminary injunction normally lasts until the completion of the trial on the merits, unless it is dissolved earlier by court order or the consent of the parties. Therefore, its duration varies and is controlled by the nature of the situation in which it is utilized.

Rule 65(a) deals with the procedure on an application for a preliminary injunction. Broadly defined, a preliminary injunction, under these rules, is an injunction issued to protect the plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits. 11 Wright & Miller, Federal Practice and Procedure, Civil § 2947 (1973). Thus, the court may issue a preliminary injunction even though plaintiff's right to relief still is uncertain.

The circumstances in which a preliminary injunction may be granted are not prescribed by these rules; the grant or denial of a preliminary injunction remains a matter for the trial court's discretion, exercised in conformity with traditional equity practice. See V. Griffith, Supra.

Although the fundamental fairness of preventing irremediable harm to a party is an important factor on a preliminary injunction application, the most compelling reason in favor of entering a Rule 65(a) order is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act. On the other hand, judicial intervention before the merits have been finally determined frequently imposes a burden on defendant that ultimately turns out to have been unjustified. Consequently, the preliminary injunction is appropriate whenever the policy of preserving the court's power to decide the case effectively outweighs

the risk of imposing an interim restraint before it has done so.

Rule 65(b) provides for injunctive relief without notice to the adverse party, This relief, known as a Temporary restraining order, can be accorded without notice provided that the verified facts of the complaint clearly justify plaintiff's apprehension about the threat of irreparable injury,

Once entered, a temporary restraining order expires by its terms. During the time it is in effect, extensions for good cause are permissible; the method of attack by the restrained party is by motion to dissolve or modify. Upon application having been made for a temporary restraining order, the court must immediately set a hearing on the companion motion for a preliminary injunction. If the temporary restraining order application is denied, the plaintiff should press for the hearing on the motion for a preliminary injunction. If the temporary restraining order is granted, then the restrained defendant should press to set the hearing on the preliminary injunction motion or on his motion to dissolve.

Under Rule 65(a)(2) the court can consolidate the hearing on the preliminary injunction with the trial of the action on the merits; in the event consolidation is not ordered, the record upon the hearing of the motion for preliminary injunction becomes a part of the record at the trail on the merits.

In the case of *Anderson, et al. v. Henderson, et al.*, Case #16,227, December 13, 1912, this Honorable Court explained when injunctions were appealable to the Supreme Court of Mississippi and in that case allowed an appeal after the Temporary Injunction was dissolved. A Temporary Injunction is no more than a Chancellor's bench ruling which has also been found not to be a final judgment and not

appealable. In *Grey v. Grey*, 638 So. 2d 488 (Miss. 1994) at page 638 the Court wrote:

> [2]> [3]> [4] A chancellor's bench ruling is not final, but is subject to modification by that same chancellor. > *Love v. Barnert*, 611 So.2d 205, 208 (Miss. 1992). The chancellor's decision is not the same thing as the court's final judgment. > *Banks v. Banks*, 511 So.2d 933,193S (Miss. 1987). Only a final judgment is appealable. > *Id.*

ARGUMENT

The Appellee would respectfully submit unto this Honorable Court that the instant case is not subject to appeal to this Honorable Court until such time as the Chancellor has had an opportunity to make a final judgment. Under MRCP 65, the Temporary Restraining Order would be dissolved were it not for the stay sought by the Appellants and entered by Justice Scalia. At this point, the Appellants will be forced to argue that Justice Scalia's stay did not stay the proceedings before the Chancellor and they therefore, can appeal this case to this Honorable Court. If that is the case, one can only wonder why they did not appear for the hearrng before Judge McKenzie as ordered, or why they did not move separately to dissolve the restraining order? The Appellants in this case are seeking nothing more than to obtain a ruling from this Honorable Court so that they can justify their request for certiorari to the Supreme Court of the United States of America when the trial judge they wish to appeal has never been granted the opportunity to make a final ruling on the issues that were presented by the Appellants VERIFIED COMPLAINT. Until such time as the trial judge has had that opportunity, no appeal in this cause of action is appropriate and the appeal of the Chamber of Commerce of the United

States of America should be dismissed and the case remanded to the First Judicial District of Jones County, Mississippi for final ruling by the Honorable Chancellor.

Respectfully submitted,

BILLY JOE LANDRUM

/s/ By: Thomas T. Buchanan
THOMAS T. BUCHANAN

TUCKER BUCHANAN, P.A.
Thomas T. Buchanan - Bar #7022
Attorney at Law
P. O. Box 4326
Laurel, MS 39441
649-8000

CERTIFICATE OF SERVICE

I, THOMAS T. BUCHANAN, do hereby certify that I have this day mailed, by United States Mail, first class postage prepaid, a true and correct copy of the above and foregoing BRIEF IN SUPPORT OF MOTION TO DOCKET AND DISMISS to counsel. opposite at:

Hon. Michael B. Wallace
Hon. Christopher R. Green
Phelps & Dunbar, L.L.P.
P.O. Box 23066
Jackson, MS 39225-2300

THIS the 3rd day of January, 2001.

/s/ Thomas T. Buchanan
THOMAS T. BUCHANAN

IN THE UNITED STATED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:00-cv-778WS

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
Plaintiff,

vs.

MICHAEL MOORE, ATTORNEY GENERAL,
STATE OF MISSISSIPPI,
ERIC CLARK, SECRETARY OF STATE,
STATE OF MISSISSIPPI
Defendants.

FINAL JUDGMENT

This cause came before the court on the plaintiff's Motion for Expedited Declaratory Relief under Title 28

U.S.C. §§ 2201 [1] and 2202 [2], asking this court to declare that the plaintiff may televise certain political advertisements favoring specific candidates for the popularly elected Mississippi Supreme Court without being subjected to Mississippi's law pertaining to election contributions and reporting. This court, after considering the arguments and briefs of the parties, found in a separate Memorandum Opinion and Order that the advertisements at issue provided explicit directives to vote for the named candidates, and were subject to Mississippi's law governing election contribution disclosure. Therefore, in accordance with this court's Memorandum Opinion and Order, this court finds for the defendants and against the plaintiff, and the defendants are entitled to recover costs.

SO ORDERED AND ADJUDGED this the 23rd day of January, 2001.

---

[1] Title 28 U.S.C. § 2201 provides:

> (a) In a case of actual controversy within its jurisdiction except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986 a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[2] Title 28 U.S.C. § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

/s/ _____
UNITED STATES DISTRICT JUDGE

Civil Action No. 3:00-cv-778WS
Final Judgment

IN THE SUPREME COURT OF MISSISSIPPI

[Filed Mar. 2, 2001]

No. 2000-TS-02048

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA

v.

BILLY JOE LANDRUM

ORDER

This matter is before the panel of Banks, P.J., Mills and Waller, JJ., on the Motion to Docket and Dismiss filed by Honorable Billy Joe Landrum. After due consideration, the panel finds that the motion should be denied.

IT IS THEREFORE ORDERED that the Motion to Docket and Dismiss filed by Honorable Billy Joe Landrum is denied.

SO ORDERED, this the 2nd day of March, 2001.

/s/ Fred L. Banks, Jr.
FRED L. BANKS, JR.
Presiding Justice

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF
JONES COUNTY, MISSISSIPPI

[Filed Mar. 14, 2001]

CAUSE NO. 2000-0204

BILLY JOE LANDRUM,
Petitioner,

v.

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, *et al.*,
Respondents.

ORDER

This matter is before the Court pursuant to Rule 10(c) and (e) of the Mississippi Rules of Appellate Procedure.

On February 5, 2001, the Chamber of Commerce of the United States of America filed with the Clerk of this Court a Statement of Evidence and Proceedings pursuant to Rule 10(c) of the Mississippi Rules of Appellate Procedure. A copy was served upon counsel for Billy Joe Landrum. On February 14, 2001, Billy Joe Landrum filed an objection to the Chamber's statement of evidence. Accordingly, it is incumbent upon this Court to settle the issue of the trial court record pursuant to Rule 10(e) of the Mississippi Rules of Appellate Procedure. The following constituted the trial court record of the proceedings held in this matter:

1. On November 5, 2000, the Court was presented with a verified complaint styled Billy Joe Landrum versus Chamber of Commerce of the United States of America, WDAM, WLOX, WLBT and Other News Media.

2. The Complaint requested the issuance of a temporary restraining order against the Respondents for the reasons set forth therein.

3. The Court was personally aware of the nature and content of the political advertisements in issue, having viewed them on television as would any other citizen.

4. The Court was presented with and read the decision of US District Judge Henry T. Wingate in the case styled Chamber of Commerce of the United States of America versus Michael Moore, et al, civil action no. 3:00-cv-778WS in the United States District Court for the Southern District of Mississippi, Jackson Division.

5. The Court was made aware of the fact that temporary restraining orders had been issued against the Chamber and news media to restrain the publication of similar advertisements by the Chancery Court of Harrison County, Mississippi and the Chancery Court of Hinds County, Mississippi, and that the Supreme Court of Mississippi had refused to vacate the Hinds County Order.

6. Based upon the foregoing the Court issued its Temporary Restraining Order and set a hearing date of Wednesday, November 8, 2000 at 9:00 a.m.

7. On Monday, November 6, 2000 this Court received an Order from Associate Justice of the United States Antonin Scalia which stayed the restraining order granted by this Court pending the timely filing and disposition of writ of certiorari.

8. On November 8, 2000 the case was called on the Court's docket, the Petitioner's counsel appeared and no appearance was made by any Respondent. At that point the Court considered the issue moot

due the stay issued by Associate Justice Scalia of the United States Supreme Court and the outcome of the election.

SO ORDERED, ADJUDGED AND DECREED on this the 14th day of March, 2001.

/s/ Frank McKenzie
FRANK MCKENZIE
Chancellor

IN THE SUPREME COURT OF MISSISSIPPI

No. 2000-2048

CHAMBER OF COMMERCE OF THE UNITED STATES
Appellant

v.

BILLY JOE LANDRUM
Appellee

APPEAL FROM THE CHANCERY COURT
OF JONES COUNTY, MISSISSIPPI

BRIEF OF APPELLANT CHAMBER OF COMMERCE OF THE UNITED STATES

MICHAEL B. WALLACE (MB #6904)
CHRISTOPHER R. GREEN (MB #99593)
PHELPS DUNBAR LLP
Suite 500, SkyTel Centre
200 S. Lamar Street
P. 0. Box 23066
Jackson, MS 39225
Telephone: (601) 352-2300

JAN WITOLD BARAN
THOMAS W. KIRBY
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, DC 20006

STEPHEN A. BOKAT
1615 H Street, N.W.
Washington, DC 20062

COUNSEL FOR APPELLANT
CHAMBER OF COMMERCE
OF THE UNITED STATES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Chamber of Commerce of the United States, a nonprofit corporation representing business interests, appellant;
2. Michael B. Wallace and Christopher R. Green, Phelps Dunbar, Jackson, Mississippi; Jan Witold Baran and Thomas W. Kirby, Wiley, Rein & Fielding, Washington, DC; Stephen Bokat, Washington, DC; counsel for appellant;
3. Circuit Judge Billy Joe Landrum, appellee;
4. Thomas T. Buchanan, Laurel, Mississippi, counsel for appellee;
5. Supreme Court Justice Oliver Diaz, plaintiff in a similar lawsuit against the Chamber;
6. Joseph A. Lococo, Lococo & Lococo, D'Iberville, Mississippi, and Leonard A. Blackwell II, Blackwell & White, Gulfport, Mississippi, counsel for Justice Diaz;
7. Circuit Judge Frank G. Vollor, plaintiff in a similar lawsuit against the Chamber;
8. William A. Pyle, Jackson, Mississippi, counsel for Judge Vollor, and plaintiff in a similar lawsuit against the Chamber;
9. Paul Kelly Loyacano, Vicksburg, Mississippi, counsel for Judge Vollor and Mr. Pyle;

10. Robert Bruce McDuff, Jackson, Mississippi, counsel for Judge Vollor;

11. Television station WLOX, Biloxi, unserved co-defendant in the action here and in *Vollor* and *Pyle*, and participating co-defendant in *Diaz*;

12. Henry F. Laird, Jr., Watkins Ludlum Winter & Stennis, Gulfport, Mississippi; counsel for WLOX in *Diaz*;

13. Television station WDAM, Hattiesburg, unserved co-defendant in the action here and in Diaz;

14. Television station WLBT, Jackson, unserved co-defendant in the action here and in *Vollor* and *Pyle*;

15. Television stations WABG, Greenville; WXVT, Greenville; WAPT, Jackson; WJTV, Jackson; WDBD, Jackson; WTOK, Meridian; and WCBI, Columbus; unserved co-defendants in *Vollor* and *Pyle*; and

16. Televisions stations WHLT, Hattiesburg; WTVA, Hattiesburg; WLOV, Tupelo; WMC, Memphis; WREG, Memphis; and WPTY, Memphis; unserved co-defendants in Pyle.

/s/ Michael B. Wallace
MICHAEL B. WALLACE

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS ii
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES vi
INTRODUCTION 1
STATEMENT OF THE ISSUES 2
STATEMENT OF THE CASE 2

I. Course of the proceedings 2

II. Statement of relevant facts 9

SUMMARY OF THE ARGUMENT 10

ARGUMENT 11

Standards of review 11

I. Miss. Code § 23-15-801 et seq. and § 23-15-1021 do not authorize injunctive relief sought by individuals 12

A. Miss. Code § 23-15-8010), -807, and -809 do not ban express advocacy; they only subject it to disclosure requirements, and neither § 23-15-1021 nor § 23-15-801 *et seq*. authorize injunctions against speech 12

B. Miss. Code § 23-15-809 allows only for enforcement by the Attorney General 14

II. The injunction is an unconstitutional prior restraint 15

III. The injunction was improperly issued without notice 18

IV. The Chamber of Commerce's speech lacks express words of advocacy, and so is shielded, even from regulation, by Miss. Const. Art. 3 § 13 and the First and Fourteenth Amendments of the United States Constitution 19

A. Moore concedes that it disagrees with five federal circuits, which shield from regulation any independent speech lacking explicit words of express advocacy 19

1. *Buckley* and *MCFL* require express words of advocacy 20

2. A strong majority of state and federal courts disagree with Moore's approach. 23

3. *MCFL* did not state an "essential nature" test 25

4. *Buckley* insisted that the protection for independent political speech embodied in the express-advocacy test was not a "loophole," however much it might look like one to courts like *Moore* 27

5. *Moore* misconceived the status of speech about candidates 27

B. Even under the Ninth Circuit's *Furgatch* test, the Chamber's advertising is not express advocacy, because it lacks a "clear plea for action..... 28

CONCLUSION..... 32

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

CASES

Alexander v. United States, 509 U.S. 544, 550 (1993) 16
Allyn v. Wortman, 725 So-2d 94 (Miss. 1998) 15
Buckley v. Valeo, 424 U.S. 1 (1976) 4-5,11,13,19-23, 25-29, 31
Chamber of Commerce v. Pyle, No. 00A411(U.S. Nov. 7, 2000) 6
Chamber of Commerce v. Vollor, Diaz, and Landrum, No. 00A406 (U.S. Nov. 6, 2000) 6-7
Champ v. Poelker, 755 S.W.24 383 (Mo. App. 1988) 15
Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.34 1174 (10th Cir. 2000) 23
City of Oxford v. Northeast Mississippi Elec. Power Ass'n., 704 So.2d 59 (Miss. 1997) 13
Colorado Republican Party v. FEC, 518 U.S. 604 (1996) 4, 14
Cort v. Ash, 422 U.S. 66 (1975) 15
Crumpton v. Keisling, 982 P.24 3 (Or. App. 1999) 28
Diaz v. Chamber of Commerce, No. C2402-00-01086 (Harrison County Chancery Court Nov. 4 & 6, 2000) 6-8,12,18
Dobbins v. Crowell, 577 S.W.24 190 (Tenn. 1979) 14
Donald v. Amoco Prod. Co., 735 So.24 161 (Miss. 1999) 11
Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S.568 (1988) 13
Elections Bd. v. Wisconsin Mfrs. & Commerce, 597 N.W.2d 721(Wis. 1999) 28-29

TABLE OF AUTHORITIES—Continued

Faucher v. FEC, 928 F.24 468 (1st Cir. 1991)..... 23
FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir.1980)..... 23
FEC v. Christian Action Network, 110 F.34 1049 (4th Cir.1997)..... 23-25, 30
FEC v. Christian Coalition, 52 F.Supp.24 45 (D.D.C.1999)..... 29
FEC v. Furgatch 807 F.2d 857 (9th Cir.1987)..... 20, 23, 28-31
FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 249 (1986)..... 11,19-20, 22-23, 25-31
FEC v. National Org. for Women, 713 F. Supp. 428 (D.D.C. 1989)..... 29
First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)..... 16
Florida Right to Life, Inc. v. Lamar, 238 F.3d 1288 (11th Cir. 2001), *aff'g* 1999 WL 33204523 (M.D. Fla. 1999)..... 23
Forster v. Delton School Dist., 440 N.W.24 421(Mich. App. 1989)..... 14
Goff v. Ehrlich, 776 So.24 1011(Fla. App. 2001)..... 15
Humphreys v. Stafford, 71 Miss. 135,13 So. 865 (1893)..... 9
Iowa Right to Life Comm., Inc. v. Williams, 187 F.34 963 (8th Cir.1999)..... 23
Jeffries v. State, 724 So.2d 897 (Miss. 1998)..... 17
League of Women Voters of Colorado v. Davidson, 2001 WL 363677 (Colo. App. 2001)..... 20, 23-24, 27-28
Maine Right to Life Comm., Inc. v. FEC, 98 F.3d 1(1st Cir.1996), *aff'g* 914 F. Supp. 8 (D. Me. 1996)..... 23

TABLE OF AUTHORITIES—Continued

McCauley v. BFC Direct Marketing, 20 Cal.Rptr.2d 498 (Cal. App. 1993) 15
Mississippi Commission on Judicial Performance v. Byers, 757 So.2d 961 (Miss. 2000) 17
Near v. Minnesota, 283 U.S. 697 (1931) 15
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 16
New York Times v. United States, 403 U.S. 713 (1971) 16
Patterson v. Colorado, 205 U.S. 454 (1907) 15
Perry v. Bartlett, 231 F.34 155 (4th Cir. 2000) 23, 25
Pyle v. Chamber of Commerce et al., No. G2000-2137 S/2 (Hinds County Chancery Court Nov. 6, 2000) 6, 8
Republican Party of Fla. v. Florida Elections Comm'n, 658 So.2d 653 (Fla. App. 1995) 6,16-17
Thornton v. Breland, 441 So.2d 1348 (Miss. 1983) 17
United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366 (1909) 13
Vance v. Universal Amusement Co., 445 U.S. 308 (1980) 16
Vann v. Mississippi Neurosurgery, P.A. (In re: Estate of Petrick), 635 So.2d 1389 (Miss.1994) 11
Vermont Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376 (2d Cir. 2000) 23
Vollor v. Chamber of Commerce of the United States et al., No. G2000-2128 S/2 (Hinds County Chancery Court Nov. 3, 2000) 5-6,8,18

CONSTITUTIONS

U.S. Const. Amend. I 1-2, 11, 15-17, 19-22, 24, 27-28, 31
US. Const. Amend. XIV 1, 2, 15, 19
Miss. Const. art. 3 § 13 ..... 2, 17, 19

STATUTES AND RULES

Miss. Code Ann. § 23-15-801 ..... 2-4, 7-8, 10-12, 19-20
Miss. Code Ann. § 23-15-807 ..... 3, 12
Miss. Code Anna § 23-15-809 ..... 3-4, 8, 12, 14
Miss. Code Ann. § 23-15-811 ..... 8, 12-13, 28

TABLE OF AUTHORITIES—Continued

Miss. Code Ann. § 23-15-813 ..... 12, 14
Miss. Code Ann. § 23-15-977.1 14
Miss. Code Ann. § 23-15-1021 ..... 2, 7-8, 10, 12-14
Miss. R. Civ. P. 65 ..... 11, 18

MISCELLANEOUS

Black's Law Dictionary (6th ed. 1990) 20
4 Blackstone's Commentaries 15
B. Bridges & J. Shelson, *Griffith's Mississippi Chancery Practice* (2000 ed.) 13
V. Griffith, *Mississippi Chancery Practice* (2nd ed. 1950) 13
15A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* (2nd ed. 1992) 9
Chamber Ad Debate Continues, Clarion-Ledger, April 23, 2001, at B1 5
US Chamber Seeks to Clarify Election Laws, Corporate Legal Times, April 2001, at 31 5

INTRODUCTION

This case involves one of four prior restraints of political speech issued on the eve of the November 2000 judicial elections. Appellant Chamber of Commerce of the United States (the Chamber) ran advertisements relating to issues and candidates involved in these elections. The Chamber became involved in a dispute with the Secretary of State and Attorney General over whether, because it ran those ads, the Chamber was required to make certain disclosures under the Mississippi Election Code. A federal district court, evaluating the federal constitutional issues under the First and Fourteenth Amendments, decided that the advertisements were "express advocacy" of electoral action and thus not shielded from disclosure-based regulation by the State.

At the prompting of judicial candidates who objected to the Chamber's advertising as such-not merely to the Chamber's claim that its speech was not subject to disclosure-based regulation, but to the continued airing of the ads at all-several chancellors then relied on the federal district court opinion to enjoin the Chamber's advertising in the closing days before the election. One of these orders is at issue here. The Chamber challenges the order because it was unauthorized under state law, was an unconstitutional prior restraint of free speech, improperly lacked notice to the Chamber, and was founded on error in the federal district court opinion.

STATEMENT OF THE ISSUES

1. Do Miss. Code § 23-15-801 *et seq.* or § 23-15-1021 authorize injunctions against political speech or private rights of action?

2. Do Miss. Const. art. 3 § 13 and the First and Fourteenth Amendments of the United States Constitution allow prior restraint of advertisements on the theory that they were improperly funded?

3. May a restraining order be granted without notice where the identity of defendant's counsel is readily available to plaintiff and the court?

4. Do Miss. Const. art. 3 § 13 and the First and Fourteenth Amendments of the United States Constitution allow regulation of speech that lacks explicit words advocating electoral action?

STATEMENT OF THE CASE

I. Course of the proceedings

As this Court knows well, the November 7, 2000, Mississippi election included races for four seats on the Supreme Court of Mississippi:

- a race involving Circuit Judge Frank G. Vollor and Justice Jim Smith in the First Supreme Court District;
- a race involving Justice Oliver Diaz, Circuit Judge Keith Starrett, and Circuit Judge Billy Joe Landrum in the Second Supreme Court District;
- a race involving then-Chief Justice Lenore Prather and now-Justice Charles Easley in the Third Supreme Court District; and
- a race involving Justice Kay Cobb and Chancellor Percy L. Lynchard in the Third Supreme Court District.

Appellant Chamber of the Commerce of the United States (the Chamber) produced several television advertisements and aired them during the three weeks before the election. Those advertisements that are described in the record chiefly touted the qualifications and records of Chief Justice Prather, Justices Cobb and Smith, and Judge Starrett. These advertisements did not, however, contain any explicit words advocating electoral action such as "vote for" or "defeat." R. 29-31, RE 12-14.

Shortly after the Chamber began running its ads, Attorney General Michael Moore and Secretary of State Eric Clark publicly suggested that the Chamber's ads were subject to disclosure requirements under Miss. Code Ann. § § 23-15-809(a) (1990) and 23-15-807 (Supp. 2000) because the advertisements "expressly advocat[ed] the election or defeat of a clearly identified candidate" under Miss. Code Ann. § 23-15-8010) (Supp. 2000).[1] Neither General Moore nor Secretary Clark sought to remove the Chamber's advertising

---

[1] Section 23-15-801 is the definition section of the "Disclosure of Campaign Finances" article of the Election Code. Subsection (j) provides:

> The term "independent expenditure" shall mean an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate.

This definition becomes relevant in § 23-15-809, which provides that that "[e]very person who makes independent expenditures in an aggregate amount or value in excess of Two Hundred Dollars ($200.00) during a calendar year shall file a statement containing the information required under Section 23-15-807," and requires disclosures whether the expenditure is in support or in opposition to the candidate involved, a certification whether the expenditure is coordinated with any candidate or candidate's committee, and a list of donors above $200. Section 23-15-807 provides for a detailed periodic system of reporting contributions and expenditures administered by the Secretary of State.

from the air; nor did they claim that any other statutes were at issue. R. 28-29, RE 11-12.

Seeking to clarify the legal situation regarding whether its advertisements were subject to the state's disclosure requirements—not the legality of those advertisements as such-the Chamber brought an action for declaratory relief in the United States District Court for the Southern District of Mississippi, *Chamber of Commerce v. Moore*, No. 3:00-CV-778WS. The action named Attorney General Moore and Secretary of State Clark as defendants. It sought a declaration that the Chamber's ads did not include express advocacy and hence were not, as a matter of federal constitutional law, subject to the Mississippi statute.[2]

On November 2, 2000, the Thursday before election day, United States District Court Judge Henry T. Wingate issued a Memorandum Opinion and Order in the Chamber's declaratory judgment action (Moore). R. 24-69, RE 7-52. Judge Wingate explained that the Chamber's ads were independent speech, there being "no proof whatsoever of any

---

[2] The Chamber relied on cases beginning with *Buckley v Valeo*, 424 U.S. 1, 43-44 & n.52 (1976), which have held that disclosure regulations may not be placed upon independent political speech unless that speech is a "communication[] that include[s] explicit words of advocacy of election or defeat of a candidate," 424 U.S. at 43, that is, "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," 424 U.S. at 44. Footnote 52 followed: "This construction [of the federal statute at issue] would restrict the application of § 608 (e) (1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' "The language of Miss. Code § 23-15-801(j), enacted in 1978 just after *Buckley*, evidently attempts to comply with this holding.

collaboration between the Chamber and the candidates involved in the advertisements." R. 25, RE 8.[3]

Defendants claimed that Mississippi election law applied on the sole theory that the Chamber's ads "expressly advocate the election of the favored candidates for the four Mississippi Supreme Court seats," R. 26, RE 9, and thus were "'independent expenditures' subject to the reporting requirements of Mississippi Code Annotated §§ 23-15-801(j) and 809." R. 28, RE 11. Judge Wingate ruled for the defendants, holding that the Chamber advertisements "offer thinly veiled exhortations to support the campaigns of the aforesaid candidates, a plain, clever attempt to avoid the reach of Mississippi reporting and disclosure laws by eliminating those words listed at footnote 52 of *Buckley*." R. 50, RE 43. Judge Wingate conceded that his ruling conflicted with the four most recent federal circuits to address the issue.[4] *See* R. 37-40, RE 30-33.[5]

Despite the fact that the State in *Moore* never suggested that a prior restraint would be possible,[6] over the next days,

---

[3] As noted below, without coordination, speech may not constitutionally be treated as a contribution. Colorado *Republican Part v. FEC*, 518 U.S. 604, 619 (1996).

[4] As noted below, the Tenth Circuit and the Colorado Court of Appeals have since November agreed with these four circuits, and the majority view was not even questioned in an appeal before the Eleventh Circuit. See below, p. 23.

[5] Judge Wingate's opinion was interlocutory and not immediately accompanied by a judgment. After disposing of motions regarding the entry of judgment, a final judgment was entered in January. R. 70-71, RE 53-54. *Moore* is now on appeal at the U.S. Court of Appeals for the Fifth Circuit, No. 00-60779.

[6] The state's lead attorney, T. Hunt Cole, has been quoted in the press: "Our position on this thing was narrow, in the sense that we want reporting and disclosure, not prior restraint." Cole added that the post-Moore TROs were "crazy" and "didn't follow." US Chamber Seeks to Clarify, Election Laws, Corporate Legal Times, April 2001, at 31.

four restraining orders, including the order under review here used Judge Wingate's opinion as the basis to take the Chamber's advertising off the air.

On Friday morning, November 3, 2000, Circuit Judge Frank Vollor sought an injunction in Hinds County Chancery Court against Chamber ads related to the First District race. *Vollor v. Chamber of Commerce of the United States et al.*, No. G2000-2128 Sl2 (Hinds County Chancery Court Nov. 3, 2000).[7] Counsel for the Chamber, Mr. Wallace, was notified just before a hearing before Chancellor William Singletary. Counsel for the Chamber contested the court's jurisdiction over the Chamber, explained the lack of injunctive or private remedies under the Election Code, and presented the leading case on the intersection of prior-restraint doctrine and campaign-finance law, *Republican Party of Fla. v. Florida Elections Comm'n*, 658 So.2d 653 (Fla. App. 1995). Just past 4pm, Chancellor Singletary enjoined the Chamber from contracting to produce and air any advertising relating to the Vollor-Smith race. A request for emergency relief from this Court was presented just before the Court closed for the weekend and was denied at approximately 6 pm. The Chamber then sought emergency relief from the United States Supreme Court Circuit Justice Antonin Scalia, who issued a stay of the *Vollor* TRO on Monday morning, November 6, 2000, pending the filing and disposition of a writ for

---

Secretary Clark has also disavowed any suggestion that even express advocacy can be removed from the air or is subject to contribution limits: "If you will disclose where the money comes from and how it is spent, you can raise any amount of money and spend it. . . . If the U.S. Chamber of Commerce had filed a report and disclosed where it came from, we would not have said word one to them. The issue is disclosure." Chamber Ad Debate Continues, Clarion-Ledger, April 23, 2001, at B1.

[7] Unpublished opinions that may not be available to the Court are included in Appendix A to this brief.

certiorari. *See Chamber of Commerce v. Vollor*, No. 00A406 (U.S. Nov. 6,2000).[8]

Later on Monday, without any notice to the Chamber, and after the close of business of the Supreme Court of the United States in the Eastern time zone, William Pyle, a lawyer who was present and working on Judge Vollor's behalf in the Friday hearing before Chancellor Singletary, obtained from Chancellor Singletary a state-wide restraining order (including Memphis radio stations) against any advertising by the Chamber. *Pyle v. Chamber of Commerce et al.*, No. G2000-2137 S/2 (Hinds County Chancery Court Nov. 6, 2000). This Pyle order was stayed by Circuit Justice Scalia the next morning, election day, but it effectively prevented any advertising by the Chamber on election eve. *See* Chamber of *Commerce v. Pyle*, No. 00A411 (U.S. Nov. 7, 2000).

In the meantime, Justice Diaz secured a TRO from Harrison County Chancellor Thomas Teel on Saturday, November 4, restricting any advertising by the Chamber in favor of Judge Starrett or against Justice Diaz, and setting the matter for a hearing on Monday afternoon. *Diaz v. Chamber of Commerce et al.*, No. C2402-00-01086 (Harrison County Chancery Court Nov. 4, 2000). Chancellor Teel's order was promptly stayed by Justice Scalia on Monday morning following supplementation of the Chamber's application. *Chamber of Commerce v. Vollor. Diaz, and Landrum*, No. 00A406 (U.S. Nov. 6, 2000). Following the Monday hearing, at which counsel for Chamber, Mr. Wallace, appeared, Chancellor Teel decided against any further injunction: "Plaintiff cannot establish that an injunction is available under Mississippi Code Ann. § 23-15-801 *et seq.* for a private citizen to prevent otherwise protected speech. These statutes provide specific regulations and specific

---

[8] A petition for certiorari in *Vollor* has been filed and is pending at the U.S. Supreme Court, No. 00-1255.

remedies, but not injunctive relief." *Diaz v. Chamber of Commerce*, No. C2402-00-01086, slip op. at 4 (Harrison County Chancery Court Nov. 6, 2000).

Finally, on Sunday, November 5, Judge Landrum secured a TRO from Jones County Chancellor Frank McKenzie, the order at issue here, forbidding any Chamber advertising using Judge Landrum's name. R. 9-10, RE 2-3.

Judge Landrum's verified complaint claimed on the basis of *Moore* that the Chamber's ads were "in violation of § 23-15-1021 of the Mississippi Code," and that "violation of said section has been found" (emphasis added) by Judge Wingate. R. 6, RE 4.[9] However, Judge Wingate's opinion never mentions § 23-15-1021. R. 24-50, RE 7-43. *See* also R. 28-29, RE 11-12 & nn. 8-10 (quoting the statutes at issue, Miss. Code Ann. §§ 23-15-801(j), 23-15-809, 23-15-811(Supp. 2000)); R. 33, RE 16 ("[t]he Mississippi statutes providing the focal point of this lawsuit are. . . §§ 23-15-801(j) and 23-15-809"). None of the *Vollor*, *Diaz*, or *Pyle* orders mentions § 23-15-1021.

---

[9] Section 23-15-1021, which appears in the section of the Election Code regarding judicial elections, provides:

> It shall be unlawful for any individual or political action committee not affiliated with a political party to give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property in excess of Two Thousand Five Hundred Dollars ($2,500.00) for the purpose of aiding any candidate or candidate's political committee for judge of a county, circuit or chancery court or in excess of Five Thousand Dollars ($5,000.00) for the purpose of aiding any candidate or candidate's political committee for judge of the Court of Appeals or justice of the Supreme Court, or to give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property in excess of Two Thousand Five Hundred Dollars ($2,500.00) to any candidate or the candidate's political committee for judge of a county, circuit or chancery court or in excess of Five Thousand Dollars ($5,000.00) for the purpose of aiding any candidate or candidate's political committee for judge of the Court of Appeals or justice of the Supreme Court, as a contribution to the expense of a candidate for judicial office.

In supplementing the record on appeal, Chancellor McKenzie explained that he had also been influenced by his own viewing of the Chamber's advertisements, by the *Moore* opinion, by the *Vollor* and *Diaz* orders, and by this Court's denial of emergency relief in *Vollor*. R. 76, RE 56.

The order, signed by Chancellor McKenzie as proposed by Judge Landrum, found that "the Chamber of Commerce of the United States of America has purchased political advertisements promoting an opponent of [Billy Joe Landrum], said ads being in violation of § 23-15-1021 of the Mississippi Code," holding that "the violation of said section has been found in an opinion written by [federal district judge Wingate]." R. 9, RE 2.

The order restrained the Chamber, along with "WDAM, WLOX, WLBT and other news media and television stations" from "creating, broadcasting or publishing within the jurisdiction of this Court . . . any paid advertisements concerning the race for the Supreme Court in which the name of the Petitioner, Billy Joe Landrum, [appears]." R.10, RE 3.[10]

The order was issued without notice to the Chamber, it said, because the election was only two days away, and so "there is not sufficient time to give notice to the Respondents." R.10, RE 3. The order required a $500 bond. R.10, RE 3.

On Monday, November 6, 2000, Chancellor McKenzie's order was stayed pending the disposition of a petition for a writ of certiorari by the United States Supreme Court.

---

[10] The key sentence in the order includes several words ("are hereby temporarily enjoined from broadcasting or publishing") that apparently should have been deleted from the final version of the order; it also omits a final verb. The order also purports to restrain media defendants who were never served and never entered an appearance in the Chancery Court or in this Court.

Chamber of Commerce v. Vollor, Diaz, and Landrum, No. 00A406 (U.S. Nov. 6, 2000). A hearing was set for Wednesday, November 8, the day after the election, R.10, RE 3, but because of the stay from the United States Supreme Court and the outcome of the election-Judge Landrum finished third, and only Judge Starrett and Justice Diaz advanced to a runoff-nothing further took place. R. 76, RE 56.

The Chamber timely appealed. R. 12. Judge Landrum moved to dismiss the appeal, contending that Chancellor McKenzie's order was not a final order. The Chamber responded that, because Judge Landrum's "suit was brought solely for the purpose of obtaining short-term injunctive relief," 15A C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3912 at 449 (2nd ed. 1992), the granting of that relief was an appealable final order, in that it granted "all the relief which could be afforded," *Humphreys v. Stafford*, 71 Miss. 135, 13 So. 865, 866 (1893). This Court denied Judge Landrum's motion to dismiss. R. 74.

II. Statement of relevant facts

The relevant facts are chiefly recounted in the statement of proceedings. The underlying advertisements regarding Chief Justice Prather, Justices Cobb and Smith and Judge Starrett, are described in Judge Wingate's opinion at R. 29-32, RE 12-15. The advertisements did not contain express words advocating electoral action. For instance, the advertisement involving Circuit Judge Starrett, (the advertising involved in the race at issue in this case) touts Judge Starrett as providing "common sense justice," having formed the first drug court in Mississippi which saved taxpayers over one-half-million dollars its first year, being a Baptist deacon, having headed South Mississippi Child Protection, and favoring victims' rights. R. 30, RE 13.

While additional advertisements were run by the Chamber in the time following the filing of the federal declaratory judgment action, these advertisements were not introduced into the record in support of the order. It has not been suggested that those advertisements contain express words advocating electoral action. Nor has it been suggested that those advertisements justify any further legal conclusion beyond that drawn by Judge Wingate on the basis of the advertisements he considered.

It has never been suggested in the Moore litigation, or in anything else presented in the present suit, that the Chamber has either coordinated its expenditures with candidates for judicial election or made any contribution to any such candidate or any candidate's political action committee. Indeed, the provision which the State desired to apply to the Chamber, Miss. Code. § 23-15-801(j), requires the lack of coordination. Judge Landrum provided no support for his assertion that the Chamber violated the contribution rules of Miss. Code § 23-15-1021(Supp. 2000). The one source on which he relied, *Moore*, contradicts the assertion. *See* R. 25, RE 8 ("no proof whatsoever of any collaboration between the Chamber and the candidates involved in the advertisements").

SUMMARY OF THE ARGUMENT

The injunction granted below is a prior restraint of speech, straightforwardly prohibited by the federal and Mississippi constitutions. The federal and state constitutional protections for speech have always meant, even when they meant little else, that speech may be remedied, if at all, only by after-the-fact penalties, not through prior injunctions. It is important that this Court make clear that Mississippi courts will not resist plain state and federal law on this issue. The injunction here has already resulted in extraordinary intervention by the United States Supreme Court, indicating a substantial probability of success on the merits of the Chamber's federal claim.

Additionally, the court below made two basic errors about Mississippi election law and the issues involved in the federal declaratory judgment action. First, the Chamber's advertisements were not themselves "illegal," nor had they been held so by federal District Judge Wingate in *Moore*. Mississippi election law requires only disclosure by groups that engage in "express advocacy." It does *not* prohibit such political speech. An injunction against supposedly "illegal" advertisements makes nonsense of the statute's disclosure requirements, which plainly contemplate that such speech may legally be made. Second, only the Secretary of State and the Attorney General, not private parties, may enforce Mississippi's election code.

Further, no notice was given to counsel for the Chamber, despite the easy availability of information on who that counsel was. Miss. R. Civ. P. 65(b) does not allow that.

Finally, Chancellor McKenzie relied on *Moore*'s erroneous application of the First Amendment requirement of "express advocacy." *Buckley v. Valeo*, 424 U.S. 1, 43-44 & n.52 (1976), *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986), and the decisions considering both of those decisions have made clear that explicit words of express advocacy of electoral action are required before political speech may even be subjected to disclosure requirements, let alone prior restraints.

ARGUMENT

Standards of review

The issues argued by the Chamber are all pure issues of law. They turn entirely on the interpretation of the remedies under Miss. Code § 23-15-801 *et seq.*, the limits under the federal and Mississippi constitutions on prior restraints and regulation of political speech that is not "express advocacy," and the requirements of Miss. R. Civ. P. 65(b). Such interpretive issues are reviewed de novo. *Donald v. Amoco*

Prod. Co., 735 So.2d 161,165 (Miss. 1999) (statutory interpretation); *Vann v. Mississippi Neurosurgery P.A. (In re: Estate of Petrick)*, 635 So-2d 1389, 1394 (Miss. 1994) (constitutional interpretation).

I. Miss. Code § 23-15-801 *et seq.* and § 23-15-1021 do not authorize injunctive relief sought by individuals.

Two independent statutory objections exist to Chancellor McKenzie's order here. First, it allows an injunctive remedy where the Election Code does not. Second, it allows a private right of action where the Code only authorizes enforcement by the Attorney General. Chancellor Teel correctly found in *Diaz* that Miss. Code § 23-15-801 *et seq.* does not authorize individual suits for injunctive relief. *See Diaz*, slip op. at 4 (Nov. 6, 2000).

A. Miss. Code §§ 23-15-801(j),-807, and-809 do not ban express advocacy; they only subject it to disclosure requirements, and neither §23-15-1021 nor §23-15-801 *et seq.* authorize injunctions against speech.

Miss. Code § 23-15-809(a) is very clear that it does not forbid the "independent expenditures" defined in § 23-15-801(j). Rather it requires that "every person who makes independent expenditures in an aggregate amount or value in excess of Two Hundred Dollars ($200.00) during a calendar year shall file a statement containing the information required under § 23-15-807." In speaking of those who make independent expenditures, i.e., who fund express advocacy, the statute presupposes that express advocacy may legitimately be made.

Even if the statute did specify that express advocacy was prohibited, the remedies for violating the election code do not include injunctions against speech. Miss. Code Ann. §§ 23-15-811 and 23-15-813 (Supp. 2000) provide for after-the-fact

criminal and civil penalties, but not for prospective injunctive relief. The only coercive relief provided in either statute pertaining to non-candidates is in § 23-15-813(4) (Attorney General may file suit to "compel payment of the unpaid civil penalty") and § 23-15-811 (b) (mandamus to compel political committee to submit report).

Where a statute does not provide for injunctive enforcement of a statutory scheme, courts should not infer one. Griffith's Chancery Practice is clear on this point: "Courts of equity concern themselves only with matters of property and the maintenance of civil rights and do not interfere with issues that are purely personal or political or with crimes." B. Bridges & J. Shelson, *Griffith's* Chancery Practice § 435, at 239 (2000 ed.); cf. V. Griffith, *Mississippi Chancery Practice* § 435, at 431 (2d ed. 1950) (same). The matter here is both political and involves criminal statutes, such as Miss. Code § 23-15-811(a). An injunction is not the proper remedy.

At a bare minimum, because the election code lacks any express authorization for restrictions on speech, it should be construed to avoid the severe prior-restraint constitutional questions discussed below. *See City of Oxford v. Northeast Mississippi Elec. Power Ass'n.*, 704 So.2d 59, 65 (Miss. 1997) ("If possible, a court should construe statutes so as to render them constitutional rather than unconstitutional if the statute under attack does not clearly and apparently conflict with organic law after first resolving all doubts in favor of validity.") (quotation omitted); *cf. United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)

(constitutional-doubt rule "has for so long been applied by this Court that it is beyond debate").

Nor does the section relied upon by Judge Landrum authorize an injunction against speech. The section of the Election Code invoked by Judge Landrum, § 23-15-1021-which speaks of resources given "to any candidate or the candidate's political action committee"-was not mentioned in *Moore*. Indeed, the State conceded in that litigation that the prerequisites of § 23-15-1021 were not met. R. 25, RE 8 ("no proof whatsoever of any collaboration between the Chamber and the candidates involved in the advertisements"). Although *Buckley* allows much more regulation of political contributions than it does of independent political speech, 424 U.S. at 23-38, without coordination, speech may not be regulated under the theory that it is a "contribution." *Colorado Republican Part, v. FEC*, 518 U.S. 604, 619 (1996). Because Judge Landrum attached no additional evidence of supposed contact between the Chamber and candidates or their political action committee, any contribution-based theory should be reversed based on insufficient evidence alone."[11]

Even if a violation of § 23-15-1021 were shown, however, that statute does not authorize an injunction against speech either.[12] Also, just as with § 23-15-809, the statute should be construed not to raise prior-restraint constitutional questions.

---

[11] Section 23-15-1021 does not apply for the additional reason that the Chamber is neither an individual nor a "political action committee," a term which the Legislature did not define. The Chamber is a corporation.

[12] When the Legislature adopted § 23-15-1021, it chose to enforce it by requiring judicial candidates to swear to comply with the law "under penalty of perjury." 1999 Miss. Gen Laws ch. 301 § 3, codified at Miss. Code Ann. § 23-15-977.1(Supp. 2000).

B. Miss. Code § 23-15-809 allows only for enforcement by the Attorney General.

Nowhere does the Election Code provide for a private right of action. It provides a detailed remedial scheme, with roles for the Secretary of State and for the Attorney General, in Miss. Code § 23-15-813. No private rights of action are authorized.

A large number of other courts have found, in the face of similar silences, no private right to enforce campaign-finance laws. *See Forsterv. Delton School Dist.*, 440 N.W.2d421, 423 (Mich. App. 1989) ("Because the campaign financing act creates new rights and imposes new duties, the remedies provided in the act are the exclusive means by which the act may be enforced. Since the act provides an adequate remedy to enforce its provisions, no private right of action can be inferred."); *Dobbins v. Crowell*, 577 S.W.2d 190, 193 (Tenn. 1979) ("The -[Campaign Financial Disclosure] Act contains no provision whatever, express or implied, authorizing a nominee of another political party or private citizens such as the plaintiffs to bring an action to enforce its provisions. We hold that they may not do so."); *Goff v. Ehrlich*, 776 So.2d 1011,1012 (Fla. App. 2001); *Nichols v. Kansas Political Action Committee*, 11 P.3d 1134, 1142 (Kan. App. 2000); *McCauley v. BFC Direct Marketing*, 20 Cal.Rptr.2d 498, 502 (Cal. App. 1993); *Champ v. Poelker*, 755 S.W.2d 383, 389-90 (Mo. App. 1988).

These cases generally follow the federal rule against inferring private rights of action. *See Nichols*, 1 1 P.3d at 1143 (equating Kansas rule to that in *Cort v. Ash*, 422 U.S. 66 (1975)). This Court has indicated that Mississippi follows a similar rule. *See Allyn v. Wortman*, 725 So.2d 94, 102 (Miss. 1998) (following federal cases applying *Cort* test).

No authority appears in the record requiring any different result under Mississippi law. This Court should follow the weight of authority.

II. The injunction is an unconstitutional prior restraint.

Since Blackstone, a prohibition on prior restraints of speech has been central to the freedom of speech that is protected by the federal First Amendment and applied to the states through the Fourteenth Amendment. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press." 4 Blackstone's Commentaries * 151-* 152. "[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship." *Near v. Minnesota*, 283 U.S. 697, 716 (1931). "[T]he main purpose of [the First Amendment] is to prevent all such previous restraints upon publications as had been practised by other governments." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

The order here is plainly a prior restraint, that is, an "order[] forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quotation omitted). "Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Id.*

New York Times v. United States, 403 U.S. 713 (1971), underscores the depth of the constitutional prohibition on prior restraints: even when confidential documents critical to

national security are at stake, their dissemination may not be restrained prior to publication, and the government may seek only after-the-fact penalties.

Prior restraints are "the most serious and least tolerable" form of speech regulation. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (collecting authority). Prior restraints are strongly presumed to be unconstitutional, even when their goal is to regulate a form of speech that the First Amendment does not protect. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980). Even where a prior restraint otherwise might be permissible, such as when regulating obscenity, it may not be imposed until after a final determination that the speech actually is obscene. *Id.* at 316.

Unlike obscenity, however, political speech lies at the heart of the First Amendment. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). This is true whether the speech is express advocacy or not. The strong presumption of unconstitutionality has simply not been overcome by the showing here.

The only case of which we are aware discussing prior restraints in the context of campaign finance concludes categorically that campaign funding does not rise to the level necessary to justify prior restraints. *Republican Party of Fla. v. Florida Elections Comm'n*, 658 So.2d 653, 657 (Fla. App. 1995): "The issue is whether broadcast of a political advertisement may be enjoined on the theory that it is an illegal campaign contribution. . . . [T]he issuance of an injunction under such circumstances constitutes an unconstitutional prior restraint of speech. Our freedom of speech is much too important to permit such prior restraint under the circumstances. . . . It has been said that the need for prior restraint must be 'manifestly overwhelming.' . . . Appellees have not met their heavy burden in this case."

This Court has fully agreed with the sentiments expressed by the Supreme Court of the United States and has indicated that it is just as willing as other courts to strike down improper prior restraints. *See Jeffries v. State*, 724 So.2d 897, 899-900 (Miss. 1998) (following cases from several federal circuits and other states, reversing a conviction for contempt); *Mississippi Commission on Judicial Performance v. Byers*, 757 So.2d 961, 971 (Miss. 2000) (disciplining judge in *Jeffries* for failing to apply rule against prior restraints); *Thornton v. Breland*, 441 So.2d 1348, 1350 (Miss. 1983) (refusing to impose advance enforcement of ethics rules: "It is established constitutional law that prior restraints on speech are not tolerated absent the clearest imminent danger . . . Prior restraints on expression bear a heavy presumption against their legality. The party seeking such restraint bears the heaviest burden of justification.").

Further, Miss. Const. art. 3 § 13 provides that "[t]he freedom of speech and of the press shall be held sacred." Section 13 bars prior restraints just as does the federal First Amendment, and further mandates the vigilance of trial courts in this regard. *Jeffries*, 724 So.2d at 900.

The Chancellor here plainly failed to heed the longstanding state and federal constitutional prohibitions on injunctions against speech. The order should be reversed.

III. The injunction was improperly issued without notice.

Miss. R. Civ. P. 65(b) sharply limits the circumstances in which restraining orders may be granted without notice, imposing two requirements, neither of which was satisfied here. A restraining order may be issued without notice only if "(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the

efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required." Miss. R. Civ. P. 65(b) (emphasis added).

Here, there was no indication that any effort at all had been made to contact counsel for the U.S. Chamber before the order was imposed on November 5. Chancellor McKenzie was the only one of the four judges, state and federal, involved with the Chamber's advertising who did not seek and receive input from counsel for the Chamber prior to the election.

Chancellor McKenzie was familiar with *Moore*, *Vollor*, and *Diaz*, all issued by courts who had been, or would be, in contact with counsel for the Chamber. R. 76, RE 56. Judge Landrum's counsel was able to obtain a copy of the *Moore* opinion to present to Chancellor McKenzie; either of them could have obtained the name of the Chamber's counsel from the clerk of the district court, either by telephone or by Internet. The Chamber itself could have been contacted by telephone through national 411 information service. Notice to counsel for the Chamber was thus eminently practicable. No affidavit considers the cost of providing such notice, essential to the irreparable injury prong of Miss. R. Civ. P. 65(b)(1). Nor does any certificate explain the efforts made towards such contact or the reasons why it should not be required, as required by Miss. R. Civ. P. 65(b)(2).

The present situation was not one where notifying the Chamber of what the court was planning to do would defeat the purpose of the order—for instance, where secrecy would be breached or where critical evidence would be destroyed. There was no justification for not letting counsel for the Chamber know what was happening. The order should be reversed on this ground.

IV. The Chamber of Commerce's speech lacks express words of advocacy, and so is shielded, even from regulation, by Miss. Const. Art. 3 § 13 and the First and Fourteenth Amendments of the United States Constitution.

This Court should construe "expressly advocating" in Miss. Code § 23-15-801(j) in line with the overwhelming-majority rule on the issue, and reverse the injunction here because it is based on a faulty legal premise.

Chancellor McKenzie's order against the Chamber was issued in direct reliance on Moore. *See* R. 76, RE 56; see also R. 7, RE 5¶5 (reference to Wingate's opinion in complaint); R. 9, RE 2¶2 (same in order). As noted above, Judge Wingate's opinion in Moore permitted regulation of the Chamber's speech even though that speech contained no explicit words of "express advocacy." That conclusion is concededly contrary to the majority rule, and does not even follow from the minority rule.

A. *Moore* concedes that it disagrees with five federal circuits, which shield from regulation any independent speech lacking explicit words of express advocacy.

To provide the bright-line guidance the First Amendment requires, the Supreme Court forbids regulation of independent political speech unless it contains "explicit" and "express words of advocacy of election or defeat such as 'vote for,' 'elect,' " and the like. *Buckley v. Valeo*, 424 U.S. 1, 43-44 & n. 52 (1976). *See also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (*MCFL*) (demanding "explicit" and "express advocacy" through "the use of language such as 'vote for,' 'elect,' " and the like). By its terms, the statute at issue here regulates only speech that "expressly advocat[es] the election or defeat of a clearly identified candidate." Miss Code Ann. § 23-15-8010). It is

apparent that the Mississippi legislature incorporated the express advocacy test required by the First Amendment into the statute.[13]

Moore found as a matter of law that the four advertisements contained "explicit directives to vote for the named candidates," and then failed to cite a single word from the advertisements constituting that explicit directive. R. 48, RE 31. It could not do so because these advertisements contained no such explicit words exhorting electoral action.

Not disputing that the U.S. Chamber's advertisements would be fully protected by the brightline express advocacy test, *Moore* pejoratively denounced it, as had the State, as a "magic words test" that creates a "loophole" through which speakers can escape the State's regulatory scheme. R. 35, 45-48, 50, RE 18, 28-31, 43.[14] Rejecting the majority rule, *Moore* instead invoked *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.1987), and a few other decisions as support for its ruling. R. 41-45, RE 34-39.

---

[13] The dictionary definition of "express" is "[c]lear; definite; explicit; plain; direct; not dubious or ambiguous. *Declared in terms; set forth in words.* Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. *Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct.*" *Black's Law Dictionary* 580 (6th ed. 1990) (emphasis added) (citation omitted). Similarly, "explicit" is defined as "[n]ot obscure or ambiguous, having no disguised meaning or reservation. Clear in understanding." Black's Law Dictionary 579 (6th ed. 1990).

[14] *League of Women Voters of Colorado v. Davidson*, 2001 WL 363677, *13 (Colo. App. 2001), however, distinguished a "magic words" test, which was strictly limited to the actual words listed in Buckley, from the test followed by the First, Second, Fourth, and Tenth Circuits (and which it followed itself), which, like *MCFL*, "includes the use of the words and phrases listed in Buckley and other substantially similar or synonymous words."

1. *Buckley* and *MCFL* require express words of advocacy.

Buckley v. Valeo, 424 U.S. I (1976), considered the constitutionality of the Federal Election Campaign Act. After holding unambiguously that campaign finance regulations implicate the First Amendment, 424 U.S. at 14 ("[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution"), the Court emphasized that "'a major purpose'" of the First Amendment "'was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates . . .'" 424 U.S. at 14 (citation omitted). Accordingly, "[T]he constitutional guarantee [of free speech] has its *fullest and most urgent application* precisely to the conduct of campaigns for political office." 424 U.S. at 15 (emphasis added) (citation omitted).

In two separate rulings, *Buckley* held that the government may regulate political speakers only if their speech "expressly advocate[s] the election or defeat of a clearly identified candidate." 424 U.S. at 80.

The first ruling of the Court on this point addressed a provision purporting to regulate expenditures "relative to a clearly identified candidate." 424 U.S. at 39-44 (emphasis added). The Court noted that, read broadly, the provision could deter legitimate discussion of issues, because it "fails to clearly mark the boundary between permissible and impermissible speech . . . ." 424 U.S. at 41. To avoid this problem of vagueness and overbreadth, the Court limited the term "relative to" so as "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44 (emphasis added). The purpose of this "express advocacy" test was to limit regulation "to communications that include *explicit words of advocacy of election or defeat of a candidate*" 424 U.S. at 43 (emphasis added).

A critical footnote elaborated:

> This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

424 U.S. at 44 n.52 (emphasis added).

The Court later addressed a provision of the statute defining "expenditures" as money or other valuable assets used "for the purpose of . . . influencing" the nomination or election of candidates to office. 424 U.S. at 77. Again, the Court held this language to be vague and overbroad, and once more limited "expenditure" so as "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80. The Court then cited note 52, set out above.

Thus, the Court ruled as a First Amendment mandate that the federal statute could not encompass more than "express advocacy," because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." 424 U.S. at 42. To avoid suppression of speech and to let speakers know what is and is not regulated, a bright line, objective test is necessary. The express advocacy test promulgated by the Supreme Court marks that bright line with unmistakable clarity.

A decade after *Buckley*, *MCFL* strongly reaffirmed the express advocacy test. *MCFL* addressed a prohibition on corporations and labor unions from making "a contribution or expenditure in connection with" any federal election. Literally read, the statute impermissibly prohibited issue discussion paid for by corporations or labor unions. However,

the Court applied *Buckley* and held that to avoid overbreadth problems under the First Amendment, "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441 b." *MCFL*, 479 U.S. at 249. Thus *MCFL* reaffirmed and extended the express advocacy standard to corporate political speech, ruling that while express advocacy by corporations could legitimately be regulated, speech falling short of express advocacy could not.

Applying its ruling to the pamphlet at issue, *MCFL* emphasized that the pamphlet exhorted readers to "VOTE PRO-LIFE," "a coupon was provided to be clipped and taken to the polls to remind voters of the name of the 'pro-life' candidates," and the pamphlet included "photographs of specific candidates fitting that [pro-life] description." 479 U.S. at 243, 249. Reasoning that "Vote Pro-Life" combined with "Smith is Pro-Life" is only "marginally less direct than 'Vote for Smith'," the Court concluded that the pamphlet nevertheless contained an explicit exhortation to "vote" for a clearly identified candidate. 479 U.S. at 249-50.

2. A strong majority of state and federal courts disagree with *Moore*'s approach.

Every federal court of appeals to discuss both *Buckley* and *MCFL*-the First, Second, Fourth, Eighth, and Tenth Circuits-has held that explicit words of express advocacy are necessary for the government to regulate independent political speech, rejecting an approach like that of *Furgatch*. *See Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174,1187 (10th Cir. 2000) (post-*Moore*): *FEC v. Christian Action Network*, 110 F.3d 1049,1051-55 (4th Cir. 1997); *Perry v. Bartlett*, 231 F.3d 155,160-61 (4th Cir. 2000), *cert. denied*, 121 S.Ct.1229 (2001); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir.1999); *Maine Right to*

Life Comm., Inc. v. FEC, 98 F.3d 1(1st Cir.1996), *aff'g* 914 F. Supp. 8,12 (D. Me. 1996); *Faucher v. FEC*, 928 F.2d 468, 471-72 (1st Cir. 1991).[15] The most recent state to consider the issue agrees fully with these cases. *League of Women Voters of Colorado v. Davidson*, 2001 WL 363677, *11-*13 (Colo. App. 2001).

> As the Fourth Circuit has summarized in Christian Action Network,
>
> The [Supreme] Court opted for the clear, categorical limitation, that only expenditures for communications using explicit words of candidate advocacy are prohibited, so that citizen participants in the political processes would not have their core First Amendment rights to political speech burdened by apprehensions that their advocacy of issues might later be interpreted by the government as, instead, advocacy of election results.

110 F.3d at 1051. The court emphasized that these rights apply fully, and importantly, to corporations:

> "Explicit words of advocacy of election or defeat of a candidate," "express words of advocacy," the Court has held, are the constitutional minima. To allow the government's power to be brought to bear on less, would effectively be to dispossess corporate citizens of their fundamental right to engage in the very kind of political issue advocacy the First Amendment was intended to protect-as this case well confirms.

110 F.3d at 1064.

---

[15] *See also FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir.1980) (en banc) (pre-*MCFL*, discussing only *Buckley*); *Florida Right to Life, Inc. v. Lamar*, 238 F.3d 1288,1289 (11th Cir. 2001) (post-*Moore*), *aff'g* 1999 WL 33204523 (M.D. Fla. 1999) (district court followed *Christian Action Network* on express advocacy, but issue not discussed on appeal).

The advertising protected in these cases, held not to be express advocacy, contained far more exhortation than the Chamber's advertising. *League of Women Voters* described the advertisement closest to express advocacy this way:

> The first page stated, "VOTE EARLY NOW! Don't let El Nino Stop You From Voting on November 3rd!" The next page contained photographs of the Republican candidates running for state and federal offices from the State of Colorado. The photographs were accompanied by the candidates' names printed below and the offices they sought. The next page stated, "HERE IS WHAT THESE CANDIDATES STAND FOR:" The following issues were bulleted: "Smaller government, Local control of education, Protecting Social Security, Reforming the Internal Revenue Service and our tax system, Responsible Stewardship of natural resources, Increase resources to fight the influx of drug use in Colorado, Equal opportunity for every individual." The mailer closed with "PLEASE make sure to Vote."

League of Women Voters, 2001 WL 363677, *3. The advertising in *Christian Action Network*, protected from regulation by the First Amendment, was similarly aggressive:

> Bill Clinton's vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network.

110 F.3d at 1050.

This majority rule turns entirely on the words, not the supposed purpose or intent, of the speaker. While *Moore* considered what the Chamber was "attempt[ing]" to do, R.50,

RE 43, the majority approach eschews such a murky inquiry. *Perry* explained,

> In an effort to alleviate uncertainty, the Supreme Court adopted a bright-line rule to determine when political expression may be regulated. This bright-line rule requires the use of express or explicit words of advocacy of the election or defeat of a candidate before the communication may be regulated.
>
> . . . .
>
> The Supreme Court developed the express advocacy test to focus a court's inquiry on the language used in the communications; any other test would leave the speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." In addition, circuit decisions applying *Buckley* have categorically rejected any attempt to dilute the bright-line express advocacy standard.

231 F.3d at 160-61 (quoting *Buckley*, 424 U.S. at 43) (emphasis added). Any attempt by the court or the State to discern the intent of an organization would have the effect of chilling free speech and would "create a legal standard that would be the antithesis of the bright-line express advocacy test developed in *Buckley*." 231 F.3d at 161.

Moore conceded that under these cases, the Chamber's advertisements were shielded from regulation. R. 37-40, 46, RE 20-23, 29.

3. *MCFL* did not state an "essential nature" test.

Moore misconstrued *MCFL*, contrary to every court of appeals decision construing it, to allow regulators to consider the "essential nature" of speech, rather than that speech's explicit content. R. 47-48, RE 30-31. *Moore* divined this "essential nature" by considering a variety of elements from

the background and context of the Chamber's speech, and not its text. R. 48-49; RE 31-32 (run at time of elections, similar to candidates' advertisements); R. 52-69, RE 35-52 (information available on the Internet).

Moore apparently reached this novel result-not reached by any other court to read *MCFL*—by misconstruing *MCFL*'s conclusion that a message "VOTE PRO-LIFE," coupled with specific identification of pro-life candidates, was "marginally less direct than 'Vote for Smith,' "and so did "not change its essential nature." 479 U.S. at 249. But Moore neglected the Supreme Court's critical finding in *MCFL* that the pamphlet contained "[j]ust such an exhortation" as the words listed in footnote 52 of *Buckley*, and "provides in effect an explicit directive: vote for these (named) candidates." *Id.* (emphasis added). "Marginally less direct" in *MCFL* did not mean less explicit, because the word "vote" itself appeared, but only less compact, because the explicit statement was contained in two sentences, not just one. Use of *MCFL* as support for a finding of express advocacy in the U.S. Chamber's advertisements, which do not even mention an election, is strained, illogical, and contrary to settled constitutional law.

Contrary to *Moore*, the *MCFL* Court could not have been more clear that "explicit" words of advocacy are essential for an advertisement to fall within the narrow ambit of regulable speech:

> [A] finding of "express advocacy "depend[s] upon the use of language such as "vote for," "elect," "support," etc. Just such an exhortation appears in the [newsletter]. The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that descri tion. . . . [I]t provides in effect an explicit directive: vote for these (named) candidates.

Id. at 249 (quoting *Buckley*, 424 U.S. at 44 n.52) (emphasis added). It is simply not a faithful reading of *MCFL* to

contend, as *Moore* did, R. 47-48, RE 31-32, that the "essential nature" rather than the explicit words of the speech should control. While two different sentences, each part of the text of the speech at issue, may be considered together in order to produce an explicit directive, nothing remotely like the inquiry into context here was authorized.

4. *Buckley* insisted that the protection for independent political speech embodied in the express-advocacy test was not a "loophole," however much it might look like one to courts like *Moore*.

Buckley adopted its express-advocacy standard in the face of its recognition that "the ingenuity and resourcefulness" of speakers who predictably would avoid regulation by intentionally crafting their message to "skirt[] the restriction on express advocacy of election or defeat but nevertheless benefit[] the candidate's campaign." 424 U.S. at 45. *See also League of Women Voters*, 2001 WL 363677, *13 ("[W]hile we realize that this approach permits the relatively easy circumvention of the Act, it strikes an appropriate balance between trying to preserve the goals of campaign finance reform and, at the same time, protect political speech."). *Moore*'s comment that the State may regulate the Chamber's advertisements because they are "a plain, clever attempt to avoid the reach of the Mississippi reporting and disclosure laws by eliminating those words listed at footnote 52 of *Buckley*," R. 50, RE 43, therefore runs counter to the expectations in *Buckley* itself. The First Amendment is not a loophole, but the fundamental law of the land.

5. *Moore* misconceived the status of speech about candidates.

In addition to misconstruing *MCFL*, *Moore* wrongly assessed the status of speech about candidates, improperly focusing on whether issues were otherwise discussed. The

court stressed what the advertisements *lack*—"true discussions of issues," with "elaboration of these points," R. 48, RE 31, and which "invigorates debate on many issues," R. 49, RE 32—rather than pointing to any express advocacy they contain.

Buckley itself was clear that discussion of candidates themselves was central to the First Amendment. *See* 424 U.S. at 14 (touting importance under First Amendment of both "[d]iscussion of public issues and debate on the qualifications of candidates," and noting that the issue-discussion protected under the First Amendment "of course include[s] discussions of candidates"). The express-advocacy test discussion in *Buckley* itself distinguishes "discussion of issues and candidates" from "advocacy of election or defeat." 424 U.S. at 42. *MCFL* made the point utterly plain: "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." 479 U.S. at 249.

Indeed, *Moore*'s implicit requirement that issues be discussed, and not just candidates, for speech to be shielded from regulation makes hash of *Buckley*'s actual actions regarding the particular statutes it narrowed. The only speech at issue in the first statute limited by *Buckley* was speech "relative to a clearly identified candidate." 424 U.S. at 39. Express advocacy is a subset of this class. Discussion of candidates short of expressly advocating their election is protected—indeed it is the *only* speech protected by *Buckley*'s narrowing of the first statute. Whether or not the advertisements discuss any other public-policy issues, they plainly discuss the backgrounds of the candidates, and just as plainly do not expressly advocate their election.

In sum, *Moore* concedes that it rejects the majority view, and it misconstrues the central Supreme Court cases in the area. Chancellor McKenzie's order based on it should be reversed.

B. Even under the Ninth Circuit's *Furgatch* test, the Chamber's advertising is not express advocacy, because it lacks a "clear plea for action."

Even if this Court were to disagree with every federal circuit that has interpreted the Supreme Court's decision in *MCFL* and adopt the approach to express advocacy suggested by *Furgatch*, the Chamber's advertisements would still not meet that test.[16] Although *Furgatch* purported to loosen the express advocacy standard, it nevertheless required a "clear plea for action." 807 F.2d at 864. The Ninth Circuit

---

[16] The four other decisions besides *Furgatch* mentioned in Moore are easily distinguishable. *Crumpton v. Keisling*, 982 P.2d 3, 9-10 (Or. App. 1999), adopted the Furgatch approach only for civil penalties, critically relying on the distinction. But here, criminal penalties are at issue. E.g., Miss. Code § 23-15-811(a). *See League of Women Voters*, 2001 WL 363677, *12 (similarly distinguishing *Crumpton*).

Osterberg v. Peca, 12 S.W.3d 31, 53 (Tex. 2000), found express words of advocacy in an advertisement identifying a disfavored judge and exhorting: "BRING THE COURTHOUSE BACK TO THE PEOPLE," and "VOTE FOR HIS OPPONENT." Because, just as in *MCFL*, the viewer was expressly urged to "vote" in a particular way, the advertisement is express advocacy even under the majority rule.

Elections Bd. v. Wisconsin Mfrs. & Commerce, 597 N.W.2d 721, 723-24 (Wis. 1999), actually held a *Furgatch*-based rule unconstitutional as applied retroactively, reserving the question of its constitutionality if applied prospectively.

FEC v. National Org. for Women, 713 F. Supp. 428, 434-35 (D.D.C. 1989), quoted extensively from then-recent *Furgatch*, but ultimately held that the speech at issue was not subject to regulation. Ten years later, that same judge, Judge Joyce Hens Greene, made clear that, under *MCFL*, explicit words are required for a finding of express advocacy: "[T]he communication must in effect contain an explicit directive. . . . [T]he 'express advocacy' standard requires focus on the verbs. For a communication to contain . . . an explicit directive it must use an active verb . . . ." *FEC v. Christian* Coalition, 52 F. Supp. 2d 45, 61 (D.D.C. 1999). The court found only one of the communications, a reference to a "trip to the voting booth," to be equivalent to the exhortation "vote." *Id.* at 65

emphasized that "[c]ontext remains a consideration, *but an ancillary one, peripheral to the words themselves*." 807 F.2d at 863 (emphasis added).

The Chamber's advertising simply contains no plea for action, let alone a clear one.

Furgatch involved an advertisement on the eve of the 1980 presidential election that stated, "If he [President Carter] succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT." 807 F.2d at 858. The Ninth Circuit noted that footnote 52 of *Buckley* was not an exhaustive list of words that may constitute express advocacy, but that many other words could be used. 807 F.2d at 862-63. It then established a three-part test for determining whether speech meets the express advocacy test. The speech must contain: (1) a message that is "unmistakable and unambiguous"; (2) "a clear plea for action"; and (3) "it must be clear what action is advocated." 807 F.2d at 864.

Because the phrase "DON'T LET HIM DO IT" *exhorted people to take some form of action*, *id*, the Ninth Circuit after looking at the language as a whole and conducting a *limited* review of the context found that the only reasonable interpretation of the word "IT" was reelection. *Id.* at 864-65. It is this limited contextual analysis of "IT" which separates *Furgatch* from other court of appeals cases. Only when there was an explicit call to action, and the *words* of the advertisement taken as a whole made clear that the proposed action was electoral, would the express advocacy test be met. *Id.* at 865. The court cautioned that a finding of express advocacy was appropriate only if the speech is "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Id.* at 864.

Federal Election Commission v. Christian Action Network, 110 F.3d 1049 (4th Cir.1997), carefully examined *Furgatch*. 110 F.3d at 1052-55. According to the Fourth Circuit, *Furgatch* required at least the presence in the advertisement of explicit words exhorting action. 110 F.3d at 1054. The court in *Furgatch* "declined to place too much importance on [the] intent" of the speaker because this would distract a court from the actual speech. 110 F.3d at 1053. *Furgatch*'s "almost exclusive focus on 'speech,' and specifically 'speech' defined as the literal words or text of the communication, could not have been any clearer. . . ." 110 F.3d at 1053. A court must always look at the speech in the advertisement--the literal words--and find an explicit call to action before looking to external factors indicative of intent. 110 F.3d at 1053. According to the Fourth Circuit, the absence of the words "DON'T LET HIM DO IT" would have ended the analysis for the *Furgatch* court.

The Fourth Circuit further noted that the Federal Election Commission had opposed a grant of certiorari in *Furgatch* on the ground that the Supreme Court had only recently decided *MCFL*, that *Furgatch* was limited to its facts, and that the decision did not warrant review by the Court. 110 F.3d at 1053. The Supreme Court denied certiorari in *Furgatch*. 484 U.S. 850 (1987).

Here, the words of the U.S. Chamber's advertisements highlighted the qualifications, background, and prior jobs held by certain candidates. There was no mention of any upcoming election. There was no call to action. Instead, the advertisements informed the public about public policy positions the U.S. Chamber supports using the positions of these individuals as examples.

Washington Republican Party v. Washington State Public Disclosure Commission, 4 P.3d 808 (Wash. 2000), illustrates the narrow reach of *Furgatch*. While the court allowed regulation of one advertisement based on the *Furgatch* "clear

plea" standard, *id.* at 823-24, the court held that the following advertisement was not express advocacy:

> What does Gary Locke have to say about crime in our neighborhoods? When 76 percent of voters said yes to "Three Strikes, You're Out," Gary Locke said no. When people asked for more cops on the streets in King County, Gary Locke said no. But Gary Locke said "yes" to a plan which would give self-esteem training to prostitutes and pay for a newsletter for those employed in the "sex industry," a plan so ridiculous that both Republicans and Democrats condemned it. ... Tell Gary Locke that's not what we call getting tough on crime. Tell Gary Locke that we deserve better. Paid for by the Washington State Republican Party.

id. at 812-13 (quoting the advertising); *id.* at 823 (advertising is not express advocacy: "[E]ven though the 'Tell Gary Locke' commercial was intended to persuade voters, it is still issue advocacy. The fact that the 'Tell Gary Locke' ad was partisan, negative in tone, and appeared prior to the election does not strip it of its First Amendment protection for issue advocacy.").

By concentrating on the interpretation a "reasonable viewer" would place on the advertisements, and leaving behind the stark fact that they contained no words explicitly advocating electoral action, *Moore*, is inconsistent with *Buckley*, *MCFL*, and every U.S. Court of Appeals that has addressed this issue, including *Furgatch*.

CONCLUSION

This Court should reverse the judgment below and remand for recovery by the Chamber against Judge Landrum's bond.

Respectfully submitted,

MICHAEL B. WALLACE (MB #6904)
CHRISTOPHER R. GREEN(MB #99593)
PHELPS DUNBAR LLP
Suite 500, SkyTel Centré
200 S. Lamar Street
P. O. Box 23066 Jackson, MS 39225
Telephone: (601) 352-2300

JAN WITOLD BARAN
THOMAS W. KIRBY
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, DC 20006

STEPHEN A. BOKAT
1615 H Street, N.W.
Washington, DC 20062

COUNSEL FOR APPELLANT
CHAMBER OF COMMERCE
OF THE UNITED STATES

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

CAUSE NO. 2000-2048

CHAMBER OF COMMERCE OF THE UNITED STATES,
Appellant,

versus

BILLY JOE LANDRUM,
Appellee.

APPEAL FROM THE CHANCERY COURT OF THE
SECOND JUDICIAL DISTRICT OF
JONES COUNTY, MISSISSIPPI

HONORABLE FRANKLIN C. McKENZIE,
CHANCELLOR, PRESIDING

BRIEF OF APPELLEE

TUCKER BUCHANAN, P.A.
Thomas T. Buchanan, MSB #7022
Attorney at Law
P.O. Box 4326
Laurel, MS 39441
Phone: (601)649-8000

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

CAUSE NO. 2000-2048

CHAMBER OF COMMERCE OF THE UNITED STATES,
Appellant,

versus

BILLY JOE LANDRUM,
Appellee.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal:

1. Chamber of Commerce of the United States, a nonprofit corporation representing business interests, appellant;
2. Michael B. Wallace and Christopher R. Green, Phelps Dunbar, Jackson Mississippi; Jan Witold Baran and Thomas W. Kirby, Wiley, Rein & Fielding, Washington, DC; Stephen Bokat, Washington, DC; counsel for appellant;
3. Circuit Judge Billy Joe Landrum, appellee;
4. Thomas T. Buchanan, Laurel, Mississippi, counsel for appellee;
5. Supreme Court Justice Oliver Diaz, plaintiff in a similar lawsuit against the Chamber;

6. Joseph A. Lococo, Lococo & Lococo, D'Iberville, Mississippi, and Leonard A. Blackwell II, Blackwell & White, Gulfport, Mississippi, counsel for Justice Diaz;

7. Circuit Judge Frank G. Vollor, plaintiff in a similar lawsuit against the Chamber;

8. William A. Pyle, Jackson, Mississippi, counsel for Judge Vollor, and plaintiff in a cimilar lawsuit against the Chamber;

9. Paul Kelly Loyacano, Vicksburg, Mississippi, counsel for judge Vollor and Mr. Pyle;

10. Robert Bruce McDuff, Jackson, Mississippi, counsel for Judge Vollor;

11. Television station WLOX, Biloxi, unserved co-defendant in the action here and in *Vollor* and *Pyle*, and participating co-defendant in *Diaz*;

12. Henry F. Laird, Jr., Watkins Ludlum Winter & Stennis, Gulfport, Mississippi; counsel for WLOX. in *Diaz*;

13. Television station WDAM, Hattiesburg, unserved co-defendant in the action here and in *Diaz*;

14. Television station WLBT, Jackson, unserved co-defendant in the action here and in *Vollor* and *Pyle*;

15. Television stations, WABG, Greenville; WXVT, Greenville; WAPT, Jackson, WJTV, Jackson; WDBD, Jackson; WTOK, Meridian; and WCBI, Columbus; unserved codefendants in *Vollor* and *Pyle*; and

16. Television stations WHLT, Hattiesburg; WTVA, Hattiesburg; WLOV, Tupelo; WMC, Memphis; WREG, Memphis; and WPTY, Memphis; unserved co-defendants in *Pyle*.

This the 24th day of June, 2001.

Respectfully submitted,

/s/ Thomas T. Buchanan
THOMAS T. BUCHANAN
Attorney for Appellee

TUCKER BUCHANAN, P.A.
Thomas T. Buchanan, MSB #7022
Attorney at Law
P.O. Box 4326
Laurel, MS 39441
Phone: (600649-8000

TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	iii
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	iv
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
CONCLUSION	11
CERTIFICATE OF MAILING	12

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES — Page

Carroll v. Princess Anne, 393 U.S.175,180 (1968) 4
Chamber of Commerce v. Moore, No. 00-60779 (5th Cir.) 3
Diaz v. Chamber of Commerce, No. C2402-00-01086 9
Golden v. Zwicker, 394 U.S. 103,109 (1969) 5
Nebraska Press Assocation v. Stuart, 427 U.S. 539, 563 (1976) 10
Norman v. Reed, 502 U.S. 279, 288 (1992) 5
Oil Workers Unions v. Missouri, 361 U.S. 363, 368-369, 371 (1960) 5
Pyle v. Chamber of Commerce, No. G2000-2137-S/2 9
Weinstein v. Bradford, 423 U.S. 147,149 (1975)... 5

OTHER AUTHORITIES

Mississippi Civil Procecure 6

STATEMENT OF THE ISSUES

1.Since the temporary restraining order in this case was never made permanent and has expired, since it was stayed by a Justice of the United States Supreme Court the day after it was issued, since it involved an election that is over, since there is nothing to show that the appellee will be running for office again, since there is nothing to show that the appellant will be subject to any future injunction, and since the federal court litigation that triggered all of this is now pending in the United States Court of Appeals for the Fifth Circuit, is this case moot?

2.In the event this case is not moot, is it proper to appeal the grant of a temporary restraining order without any further proceedings in the lower court?

3.In the event this Court decides to review the merits, should the temporary restraining order be reversed under the circumstances of this case because it was obtained ex parte without notice to the opposing party?

4.Are corporate television advertisements that are clearly designed to persuade voters to cast ballots for a particular state supreme court candidate and that are aired in the three weeks prior to the election, immune from state campaign finance laws simply because they do not tell the voters in exact words to "vote for" or "elect" the candidate?

5.In the event the advertisements are subject to state campaign finance laws, was a temporary restraining order permissible in the context of the unusual circumstances and timing in this case?

STATEMENT OF THE CASE

The Chamber of Commerce of the United States began running frequent television advertisements in favor of certain Mississippi Supreme Court candidates on or about October, 17, 2000, three weeks before the election. They ran these

advertisements with respect to each of the four seats on the Court that were up for election. Six days later, the Chamber filed a declaratory judgment action against the State of Mississippi and certain state officials in the United States District Court for the Southern District of Mississippi. After an expedited hearing requested by the Chamber, that Court's decision was issued on Thursday, November 2, five days before the election. In that decision, the federal court held that the Chamber's advertisements were not immune on First Amendment grounds from Mississippi's campaign finance laws.

The following day, November 3, the Hon. Frank Vollor, who was the opponent of Justice Jim Smith, sought and obtained a temporary restraining order in the Chancery Court of Hinds County, Mississippi, to prohibit the Chamber from running further advertisements in violation of Mississippi law. (The Chamber's ads supported Justice Smith). The next day, November 4, a similar TRO was issued by the Chancery Court of Harrison County relating to the race involving Justice Oliver Diaz, the Hon. Keith Starrett, and the appellee, the Hon. Billy Joe Landrum. (The Chamber's ads supported Judge Starrett). On the following day, November 5, a similar TRO was sought by the appellee and granted by the Chancery Court of Jones County in that same election. The order stated that, because of insufficient time, it was being granted without notice to the Chamber. That Court set a hearing at 9:00 AM on November 8, 2000 to determine if the injunction should become permanent. R.E. 2-3. It is this latest TRO that is the subject of this appeal.

All of these TROs, including the one that is the subject of this appeal, were stayed on November 6 by the Hon. Antonin Scalia, Associate Justice of the United States Supreme Court.

On November 8, the Chancery Court of Jones County called the present case on it's docket, having previously scheduled a hearing on whether the TRO should be made

permanent. The appellee's counsel appeared but no appearance was made by the appellant Chamber of Commerce. Because of Justice Scalia's stay and the outcome of the election (the appellee, Judge Landrum, had been eliminated), the Chancery Court considered the case to be moot. R.E. 56. In light of Justice Scalia's stay of all of the TROs, the Chamber was permitted to continue running its advertisements with respect to the November 21 runoff between Justice Diaz and Judge Starrett.

Since that time, the Chamber has appealed the federal district court's decision to the United States Court of Appeals for the Fifth Circuit. *Chamber of Commerce v. Moore*, No. 0060779 (5th Cir.). The briefing in that appeal is complete.

SUMMARY OF THE ARGUMENT

1. This case is moot. The temporary restraining order in this case was never made permanent and has expired. It was stayed by a Justice of the United States Supreme Court the day after it was issued. It involved an election that is over. There is nothing to show that the appellee will be running for office again. There is nothing to show that the appellant will be subject to any future injunction. In addition, the federal court litigation that triggered all of this is now pending in the United States Court of Appeals for the Fifth Circuit. By not appearing at the November 8, 2000 hearing, the appellant Chamber of Commerce effectively conceded that the case is moot, and the Chancellor found that it is moot. Because this case is moot, the appeal should be dismissed without addressing the complicated questions that are otherwise presented in this case.

2. If the case is not moot, further proceedings are required in the lower court before an appeal is proper. Appeals generally are not permitted from TROs. If there are further matters to be resolved in this case, they should first be

resolved in the lower court on the merits rather than in the context of a TRO. But neither the appellant nor the appellee has asked for further proceedings in the lower court, and the appellant declined to appear at the scheduled November 8 hearing. The appeal should be dismissed.

3. If the Court reviews the merits, the initial and most problematic question is whether the TRO must be reversed because of the lack of notice. This TRO was prompted by the federal court decision five days before the election, and was obtained in very hurried circumstances as the appellee was attempting to campaign against the onslaught of advertising from the Chamber. It appeared that it was not possible to give notice. However, the Chamber points out that it did receive notice and had an opportunity to participate prior to the issuance of all of the other TROs. If this Court concludes that notice was required by Rule 65(b), Miss. R. Civ. P. and the relevant United States Supreme Court case law, it should reverse on that ground without resolving the remaining questions in this case. *See, Carroll v. Princess Anne*, 393 U.S.175,180 (1968) (reversing injunction because of the lack of notice and declining to address "the thorny problem" of whether the injunction was justified under the facts).

4. As Judge Henry Wingate held in his well-reasoned federal district court decision, corporate television advertisements that are clearly designed to persuade voters to cast ballots for a particular state supreme court candidate and that are aired in the three weeks prior to the election, are not immune from state campaign finance laws simply because they do not tell the voters in exact words to "vote for" or "elect" the candidate.

5. In the event this case is not moot, in the event this Court does not resolve it on other grounds, and in the event this Court addresses the propriety of the TRO itself, the Chancellor did properly issue the TRO in the context of the unusual circumstances and timing in this case. The Chamber

had spent well in excess of Mississippi's campaign finance limits. Persons who are aggrieved by ongoing violations of the law are entitled to seek injunctive relief, and Mississippi courts have the power to issue injunctions to stop irreparable harm growing out of those violations. While the Chamber has a First Amendment right to express itself, it does not have the right to violate the campaign finance laws.

ARGUMENT

I. THIS CASE IS MOOT.

The temporary restraining order in this case was never made permanent, was stayed by a justice of the United States Supreme Court the day after it was issued, and has expired. The election is over. Nothing suggests that the appellee will run for office again. There is nothing to show that the appellant will be subject to any future injunction, and certainly nothing to show it will be subject to one at the hands of the appellee.

Any claim by the Chamber that it will suffer future harm is "wholly conjectural." *Golden v. Zwicker*, 394 U.S. 103,109 (1969). *See also, Oil Workers Unions v. Missouri*, 361 U.S. 363, 368-369, 371 (1960) (where an allegedly unconstitutional injunction against a labor strike had expired by its own terms, the case was moot despite the possibility of future injunctions against the labor unions that were involved). As a practical matter, there is "no reasonable expectation that the same complaining party [will] be subjected to the same action again," *Weinstein v. Bradford*, 423 U.S.147,149 (1975), and certainly not at the hands of the appellee here. This case is not like *Norman v. Reed*, 502 U.S. 279, 288 (1992), where the Supreme Court said the case was not moot because "[t]here would be every reason to expect *the same parties* to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional

issues that arose in 1990." (emphasis added). Here, there is every reason to expect that the same parties will *not* generate a similar controversy in the future.

Furthermore, the underlying First Amendment question of whether these advertisements constitute express advocacy or issue advocacy is pending before the Fifth Circuit in the Chamber's appeal from Judge Wingate's ruling. There is no need for this Court to resolve these questions at this time.

As previously noted, the TRO was vacated by Justice Scalia. The Chamber no longer is burdened by it. If the case were not moot, the Chamber would have appeared at the November 8 hearing to discuss further proceedings in the case. But the Chamber chose not to appear inasmuch as it is no longer impacted by the TRO. This case is moot. The appeal should accordingly be dismissed without addressing any of the other difficult questions presented by this unusual circumstances that occurred here.

II. IF THIS CASE IS NOT MOOT, IT SHOULD NOT BE HEARD ON AN APPEAL FROM A TRO, BUT SHOULD BE HEARD ONLY AFTER FURTHER PROCEEDINGS IN THE LOWER COURT.

If the case is not moot, further proceedings are required in the lower court before an appeal is proper. As one leading scholar has stated: "The Mississippi Supreme Court has not manifested enthusiasm for interlocutory review of orders relating to temporary injunctive relief." Jackson, *Mississippi Civil Procedure*, Section 19:17. If there are further matters to be resolved in this case, they should first be resolved in the lower court on the merits rather than on an appeal from a TRO.

For example, the Chamber claims that there is nothing to show that it coordinated its expenditures with candidates or contributed directly to their campaigns. (Appellant's brief, p. 10). Of course, there has been no discovery on that issue.

On November 8, the Chamber did not appear at the hearing on whether the injunction should be made permanent, and the Chancellor quite properly concluded that the case was moot. If the case is not moot, by contrast, perhaps discovery should be taken and further proceedings should occur in the lower court. But neither the appellant nor the appellee has asked for any further proceedings in the lower court.

Since this appeal seeks review of a TRO, and since neither party has instigated further proceedings in the lower court, the appeal should be dismissed.

III. IF THIS COURT DOES REVIEW THE MERITS, IT MUST FIRST ADDRESS WHETHER THE TRO SHOULD BE REVERSED FOR LACK OF NOTICE.

If the Court reviews the merits, the initial question is whether the TRO must be reversed because of the lack of notice. If the Court determines it must be reversed on that ground, it need not address the other complicated questions posed by this appeal.

This TRO was prompted by the federal court decision five days before the election, and was obtained in very hurried circumstances as the appellee was attempting to campaign against the onslaught of advertising from the Chamber. It appeared that it was not possible to give notice. However, the Chamber contends that all of the other TROs were issued with notice, and that there is no reason why notice was not given here. Miss. R. Civ. P. 65(b) requires notice unless irreparable injury will occur and requires a written certification of the efforts that were made by the movant to give notice. Because of the expedited nature of these proceedings, that written certification was not presented.

The United States Supreme Court has held that a TRO of this type violates the First Amendment "where no showing is

made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Carroll v. Princess Anne*, 393 U.S. 175, 180 (1968).

Here, the Chancellor found that notice was impractical due to the abbreviated time period. R.E. 3. Obviously, if this Court disagrees, it will be required to reverse on this ground without the necessity of addressing the other issues regarding the merits of the case. As the Supreme Court stated in *Carroll v. Princess Anne*:

> We need not decide the thorny problem of whether, on the facts of this case, an injunction . . . could be justified. The [TRO] here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued ex parte, without notice to the petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. 393 U.S. at 180.

IV. THE CHAMBER'S ADVERTISEMENTS ARE NOT IMMUNE FROM MISSISSIPPI CAMPAIGN LAWS SIMPLY BECAUSE THEY DO NOT TELL VOTERS IN EXACT WORDS TO "VOTE FOR" OR "ELECT" THE CANDIDATE.

The advertisements here were clearly designed to persuade voters to cast ballots for a particular state supreme court candidate. They were aired in the three weeks prior to the election. Contrary to the Chamber's argument, the advertisements are not immune from state campaign finance laws simply because they do not tell the voters in exact words to "vote for" or "elect" the candidate.

Judge Wingate examined the advertisements and issued a well-reasoned opinion discussing the case law from the United States Supreme Court and from other courts, state and federal. In the event this Court addresses the issue, it should reach the same result that Judge Wingate did for the reasons he expressed.

V. THE TRO WAS PERMISSIBLE IN LIGHT OF THE UNUSUAL CIRCUMSTANCES AND TIMING IN THIS CASE.

In the event this case is not moot, in the event this Court does not resolve it on other grounds, and in the event this Court addresses the propriety of the TRO itself, the Chancellor did properly issue the TRO in light of the unusual circumstances and timing in this case.

The federal court decision in this case was issued on the Thursday before the Tuesday election. The appellee, Judge Landrum, was faced with massive expenditures by the Chamber promoting his opponent. (One Chancery Judge stated that the Chamber had spent $400,000 on advertisements. *Pyle v. Chamber of Commerce*, No. G2000-2137-S12 (Chancery Ct., Hinds Cty., Nov. 6, 2000), p. 2. Another said the Chamber had placed $130,000 in ads with WLOXTV alone regarding Judge Landrum's race. *Diaz v. Chamber of Commerce*, No. C2402-0001086 (Chancery Ct., Harrison Cty., Nov. 6, 2000), p.2. The *Clarion-Ledger* recently reported that the Chamber spent $958,000 this year to impact the Mississippi Supreme Court elections. "Debate Over Tort Reform Ongoing," *The Clarion-Ledger*, June 19, 2001, pp. 1a, 4a.).

It certainly appeared the Chamber's expenditures exceeded the limits permitted under Mississippi law. Section 23-15-1021 of the Mississippi Code states that it shall be unlawful for any individual or political action committee not affiliated with a political party "to give, donate, appropriate or furnish *directly or indirectly*, any money, security, funds or property in excess of. . . $5,000.00 for the purpose of aiding any candidate . . . for . . . justice of the Supreme Court. . . ." (Emphasis added). While the Chamber claims that this statute does not apply to it, the plain language of the statute seems to suggest otherwise.

The Chamber argues that only state officials can seek relief relating to any violations of Mississippi's campaign laws, and that injunctions cannot be obtained to halt transgressions of those statutes. But in taking that position, the Chamber ignores the power of courts of equity to issue injunctions to stop ongoing violations of the law. It also ignores the fact that such injunctions can be sought by those who are suffering irreparable harm.

If the spending limits in Mississippi law were far exceeded by a candidate's supporters to the detriment of the opposing candidate, an injunction would be the only means by which the election process could be protected. Without an injunction, the candidate whose supporters abide by the law is at a distinct disadvantage to the candidate whose supporters flaunt the law with only the risk of an after-the-fact civil or criminal fine.

Although the Chamber speaks of a "prior restraint," the general presumption against prior restraints is not applicable here. Unlike cases where the harm that an injunction might prevent is "of necessity speculative," *Nebraska Press Association v. Stuart*, 427 U.S. 539, 563 (1976), the illegality is clear when spending limits are exceeded, as is the resulting harm.

This was a rare case where unexpected events unfolded in the last few days before the election. Given the unusual circumstances, the Chancellor did not err or abuse his discretion in granting the TRO. Although this case can be resolved on other grounds, if this Court decides to address the propriety of TRO, the Chancellor's order should be affirmed.

CONCLUSION

This appeal should be dismissed as moot or the lower court should be affirmed.

Respectfully Submitted,

/s/ Thomas T. Buchanan
THOMAS T. BUCHANAN
P.O. Box 4326
Laurel, MS 39441-4326
(601) 649-8000

Attorney for Appellee

CERTIFICATE OF SERVICE

I, THOMAS T. BUCHANAN, do hereby certify that I have this day mailed, by United States Mail, first class postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLEE to the Supreme Court of the State of Mississippi and Hon. Michael B. Wallace, attorney for Appellant, PHELPS DUNBAR LLP, P.O. Box 23066, Jackson, MS 39225.

THIS the 25th day of June, 2001.

/s/ Thomas T. Buchanan
THOMAS T. BUCHANAN

IN THE COURT OF COMMON PLEAS
ALLEGHENY COUNTY, PENNSYLVANIIA
CIVIL ACTION—EQUITY

[Filed Oct 23, 2001]

No. GD-01-0121066

HONORABLE LEONARD J. BODACK
4922 Hatfield Street
Pittsburgh, Pa 15201

AND

HONORABLE CHRISTINE M. TARTAGLIONE
2716 Lardner Street
Philadelphia, Pa 19149

Petitioners

v.

LAW ENFORCEMENT ALLIANCE OF AMERICA, INC.
7700 Leesburg Pike Suite 421
Falls Church, Virginia 22043,

Respondent

ORDER

AND NOW, this 23rd day of October 2001, upon consideration of the Petition for Injunctive Relief filed by Petitioners, the Honorable Leonard J. Bodack and the Honorable Christine M. Tartagline, against Respondent, Law Enforcement Aliance of America, Inc. and any and all responses therto, this Court makes the following findings:

(A) The right of Petitioners to the requested rélief is clear and irreparable harm and loss will result if a

Special Injunction in the nature of a Temporary Restraining Order is not granted forthwith;

(B) Petitioners do not have an adequate remedy at law; and

(C) Greater injury will be caused to the Petitioners, the citizens of this commonwealth and the electoral process by the denial of a Special Injunction in the nature of a Temporary Restraining Order than would be caused to the Respondent by the granting of the requested relief.

Accordingly, it is hereby ORDERED and DECREED that Petitioners' Request for a Special Injunction in the nature of a Temporary Restrainging Order is GRANTED as follows:

(1) Respondent, Law Enforcement Alliance of America, Inc. and its agents are enjoined from disseminating broadcasting, sponsoring or otherwise communicating or causing to be communicated, any advertisements, television commercials, mailings or other electioneering materials of any description for the purpose of the election of any candidate or for influencing the outcome of the November 6, 2001 Judicial elections in the Commonwealth of Pennsylvania including but not limited to political advertisements on television stations in the commonwealth of Pennsylvania which seek to promote the candidacy of the Republican candidate for the Supreme Court of Pennsylvania, the Honorable Michael Eakin and/or which seek to harm the candidacy of the Democratic candidate for the Supreme Court of Pennsylvania, the Honorable Kate Ford Elliott, until Law Enforcement Alliance of America, Inc. files a sworn affidavit with the Court certifying that it has complied with the registation and reporting requirements for a political committee as set forth in the Pennylvania Election Code at 25 P.S. §§ 3244 and 3246;

(2) Respondent, Law Enforcement Alliance of America, Inc. and its agents are enjoined from accepting contributions, or making any expenditures of funds from contributions, by any corporation in connection with the election of any candidate in the November 6, 2001 Judicial elections in the Commonwealth of Pennsylvania;

(3) Respondent, Law Enforcement Alliance of America, Inc. and it agents are enjoined from making any expenditures for the purpose of influencing the outcome of the November 6, 2001 judicial elections in the Commonwealth of Pennsylvania and/or any expenditure in connection with the eletion of any candidate in said elections, unless and until Law Enforcement Alliance of America, Inc. files a sworn affidavit with the Court cerifying that it has complied with the registration and reporting requirements for a political committee as set forth in the Pennsylvania Election Code at P.S. §§ 3244 and 3246;

(4) Respondent, Law Enforcement Alliance of America, Inc. and its agents are enjoined from accepting contributions from any and all persons for the purpose of influencing the outcome of the November 6, 2001 judicial election in the Commonwealth of Pennsylvania and from making any expenditure in connection with the election of any candidate in said elections, unless and until Law Enforement Alliance of America Inc. files a sworn affidavit with the Court cerifying that it has complied with the registration and reporting requirements for a polictical committee as set forth in the Pennsylvania Election Code at 25 P.S. §§ 3244 and 3246;

[REDACTED TEXT]

(7) This Order shall remain in full force and effect until such time as this Court specifically Orders otherwise;

(8) An evidentiary hearing on Petitioner's request for a Preliminary Injunction shall commence on 26th of [missing text] Courtroom Pittsburgh, Pennsylvannia;

(9) Petitioners shall post a bond in the amount of $15,000.00

[ILLEGIBLE]

BY THE COURT:

/s/ Illegible

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF
JONES COUNTY, MISSISSIPPI

CAUSE NO. 2000-0204

BILLY JOE LANDRUM,

Movant,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, WDAM, WLOX, WLBT AND OTHER NEWS MEDIA,

Respondents.

MOTION FOR LEAVE TO AMEND

COMES NOW, Billy Joe Landrum, and files this his MOTION FOR LEAVE TO AMEND against the Chamber of Commerce of the United States of America, and for just cause would most respectfully show unto this Honorable Court the following matters and facts, to-wit:

1. That on or about November 5, 2000, the Movant filed a VERIFIED COMPLAINT with the Honorable Court and that thereafter, this Honorable Court entered its Temporary Restraining Order, enjoining the Respondent from creating, broadcasting or publishing within the jurisdiction of this Court, any paid advertisements concerning the race for the Supreme Court in which the name of the Movant was used.

2. That said Restraining Order directed the Respondent to appear on Tuesday, November 7, 2000, for a hearing to determine if the injunction should be made permanent.

3. That subsequent to the Court's entering the Temporary Restraining Order prior to the time the Respondent could be served, the Respondent through its attorneys, without notice to the Trial Court, without notice to the Movant and without appeal to the Mississippi Supreme Court, sought and received a stay from the United States Supreme Court, staying this Honorable Court's Temporary Restraining Order, "pending the timely filing of disposition of a Petition for Writ of Certiorari."

4. The Respondent, over the objection of the Movant, filed an appeal to the Mississippi Supreme Court and on or about February 7, 2002, the Mississippi Supreme Court Order stating that the Respondent, . . .waived its right to appeal this case to this Court when it chose to file a motion to stay the state court proceedings with the United States Supreme Court and . . . The case is hereby remanded to the Chancery Court for the First Judicial District of Jones County, Mississippi for any further proceedings not inconsistent with this order.

WHEREFORE PREMISES CONSIDERED, we move the Court to enter its Order allowing an amendment of the original Complaint as set forth in Exhibit "A."

Respectfully submitted,

BILLY JOE LANDRUM

BY: /s/ Thomas T. Buchanan
THOMAS T. BUCHANAN

NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned will bring on for hearing the foregoing MOTION FOR LEAVE TO AMEND before the Hon. Franklin C. McKenzie, Chancellor, in the Chancery Courtroom of the JONES COUNTY COURTHOUSE, City of Laurel, Mississippi, on the 21st day of March, 2002, at 9:00 a.m., or as soon thereafter as counsel may be heard.

THIS the 8th day of March, 2002.

/s/ Thomas T. Buchanan
THOMAS T. BUCHANAN

CERTIFICATE OF SERVICE

I, THOMAS T. BUCHANAN, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing MOTION FOR LEAVE TO AMEND to:

HON. MICHAEL B. WALLACE,
PHELPS DUNBAR LLP,
P. 0. Box 23066
Jackson, MS 39225

JAN WITOLD BARAN
THOMAS W. KIRBY
WILEY, REIN & FIELDING
1776 K. Street, N.W.
Washington, DC 20006

STEPHEN A. BOKAT
1615 H Street, N.W.
Washington, DC 20062

THIS the 8th day of March, 2002.

/s/ Thomas T. Buchanan
THOMAS T. BUCHANAN

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI

CAUSE NO. 2000-0204

BILLY JOE LANDRUM,

Plaintiff,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, JOHN DOES A-Z,

Defendants.

AMENDED COMPLAINT

COMES NOW BILLY JOE LANDRUM, hereinafter referred to as Plaintiff, and files this, his AMENDED COMPLAINT against the Chamber of Commerce of the United States of America, hereinafter referred to as Chamber, and John Does A-Z, hereinafter referred to as John Doe Defendants, and for just cause would most respectfully show unto this Honorable Court the following matters and facts to-wit:

I. JURISDICTION

1. The Plaintiff is an adult, resident citizen of the First Judicial District of Jones County, Mississippi.

2. The Chamber is a corporation doing business in the First Judicial District of Jones County, Mississippi and is available for service of process by their attorneys of record in this cause and that John Doe Defendants, are the persons who conspired with the Chamber by giving donations for the purpose of violating the Mississippi Campaign Contribution Laws.

3. That the Chamber has submitted to the jurisdiction of this Court in this cause by previously instituting an Appeal of the instant cause which has now been remanded by the Mississippi Supreme Court.

4. That the Court has jurisdiction of the parties and the subject matter herein.

II. FACTS

5. That the Mississippi Supreme Court has remanded the instant cause and that the Temporary Restraining Order entered by this Court has expired as a result of its own terms and is now moot; and therefore, the Court should direct the $500.00 bond entered into by the Plaintiff be tendered by the clerk to the Plaintiff.

6. That prior to this Court issuing its Temporary Restraining Order, the Chamber began running frequent television advertisements in favor of certain Mississippi Supreme Court candidates on or about October 17, 2000.

7. That the Chamber's advertisements concerned candidates for the Supreme Court elections including the Plaintiff and the advertisements that ran using the name of the Plaintiff and the other candidates for the same Supreme Court post were obviously political and run in an effort to support one of the Plaintiffs opponents.

8. That the Chamber herein also ran ads relating to the other opponents which were also intended to support the Honorable Keith Starrett.

9. That the stay obtained by the Chamber through Justice Scalia's Order which was obtained without the Chamber seeking redress from the Supreme Court of

Mississippi permitted the Chamber to continue its advertisements through the election which was lost by the Plaintiff.

10. That the advertisements in question run by the Chamber were actually paid for by political supporters of the Honorable Keith Starrett and those who were opposed to the candidacy of the Plaintiff and were intended to do the Plaintiff harm and in fact, did harm the Plaintiff.

11. That the advertisements in question which persuaded the voters to cast ballots for a particular Supreme Court candidate were in violation of the Mississippi campaign finance laws.

12. That the Chamber conspired with John Doe Defendants to use the Chamber's tax free status to deliberately violate Mississippi Campaign Laws.

III. CAUSES OF ACTION

A. PERMANENT INJUNCTION

13. That the Plaintiff hereby incorporates Paragraphs 1-12 of the above AMENDED COMPLAINT.

14. That the Chamber in the instant cause owed a duty to the Plaintiff and others not to violate the campaign laws of the State of Mississippi by seeking to persuade Mississippi voters not to vote for the Plaintiff through spending large sums of money which exceeded the Mississippi laws concerning campaign finance and not report those sums in accordance with law and as a result of these actions taken by the Chamber and the John Doe Defendants the Plaintiff is entitled to a permanent injunction from this Court requiring the Chamber and John Doe Defendants to both report the

sources of its contributions and to abide by the campaign finance limits as set forth in the Mississippi Code.

B. INTENTIONAL INTERFERENCE WITH THE PLAINTIFF'S ELECTION

15. That the Plaintiff hereby incorporates Paragraphs 1-14 of the above AMENDED COMPLAINT.

16. That on information and belief the Chamber herein served as a conduit for person or persons unknown to the Plaintiff, but who for their own reasons of greed or profit set out to defeat the Plaintiff herein in his efforts to become a Justice of the Supreme Court of Mississippi and to accomplish their goals and the Chamber herein accepted these unknown persons funds and directed campaign ads in favor of the Honorable Keith Starrett and directly attacked the integrity, honesty, ability of the Plaintiff and the Chamber herein owed a duty to the Plaintiff not to use its non-profit status for the purpose of assisting others in violating the campaign finance laws of the State of Mississippi for the intended purpose of injuring the Plaintiff.

17. That the Chamber herein breached its duty not to conspire with persons intending to violate the campaign finance laws of the State of Mississippi by accepting these John Doe Defendants' funds with the expressed intent of creating, developing and airing negative ads towards the Plaintiff and others and positive ads towards Keith Starrett and others.

18. That as a direct and proximate result of the Chamber, conspiring with, assisting, and facilitating these unknown parties' desires to violate the campaign finance laws of the State of Mississippi, the Plaintiff

herein was injured by losing the election and was caused great mental distress as a result of the conspiracy of the Chamber and the John Doe Defendants and the actions of the Defendants in allowing, conspiring with and facilitating the violation of Mississippi law as aforesaid were intentional and willful and grossly negligent of the rights and feelings of the Plaintiff and therefore, the Plaintiff is entitled to punitive damages.

WHEREFORE PREMISES CONSIDERED, the Plaintiff prays that process will be issued in accordance with law and that upon final hearing hereon this Court will enter its Order permanently enjoining the Defendants from their conduct and finding both compensatory and punitive damages and granting unto the Plaintiff compensatory and actual damages and punitive damages in an amount which would deter the Defendants, from such actions in the future and if he has prayed for any wrong or improper relief the Plaintiff prays for such relief as in equity as to which we may be entitled.

Respectfully submitted,

BILLY JOE LANDRUM

BY: /s/ Thomas T. Buchanan
THOMAS T. BUCHANAN

CERTIFICATE OF SERVICE

I, THOMAS T. BUCHANAN, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing AMENDED COMPLAINT to:

HON. MICHAEL B. WALLACE,
PHELPS DUNBAR LLP
P. O. Box 23066
Jackson, MS 39225

JAN WITOLD BARAN
THOMAS W. KIRBY
WILEY, REIN & FIELDING
1776 K. Street, N.W.
Washington, DC 20006

STEPHEN A. BOKAT
1615 H Street, N.W.
Washington, DC 20062

THIS the 8th day of March, 2002.

/s/ Thomas T. Buchanan
THOMAS T. BUCHANAN

TUCKER BUCHANAN, P.A.
Thomas T. Buchanan - Bar #7022
Attorney at Law
P. 0. Box 4326
Laurel, MS 39441
Phone: 601-649-8000
Fax: 601-649-8009

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 00-60779

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MIKE MOORE, ATTORNEY GENERAL, STATE OF MISSISSIPPI;
ERIC CLARK, SECRETARY OF STATE, STATE OF MISSISSIPPI,
Defendants-Appellees.

April 5, 2002

Before JOLLY and PARKER, Circuit Judges, and MILLS,* District Judge.

E. GRADY JOLLY, Circuit Judge:

This appeal of a declaratory judgment by the Chamber of Commerce of the United States of America involves the First Amendment and state regulation of political advertisements aired shortly before the election for members of the Mississippi Supreme Court. During the 2000 election season, the Chamber ran four television commercials describing the background and qualifications of candidates seeking positions on the court. The defendant state officials initiated a review of the advertisements to determine whether they were subject to a Mississippi statute that requires the disclosure of "independent expenditures" that "expressly advocate" the election or defeat of a specific candidate. In response, the

---

* District Judge of the Central District of Illinois, sitting by designation.

Chamber sought a declaratory judgment that its advertisements were not subject to the disclosure law. The district court, in a thoughtful and reasoned opinion, held that the advertisements were subject to state regulation because reasonable minds could not differ that the advertisements advocate the election of the specified candidates.

The Supreme Court has held that the First Amendment permits regulation of political advertisements, but only if they *expressly* advocate the election or defeat of a specific candidate. There is some disagreement, however, concerning the standard to be applied in determining whether a given advertisement contains "express advocacy." Today we follow most Courts of Appeal that have considered the issue. We hold that a state may regulate a political advertisement only if the advertisement advocates *in express terms* the election or defeat of a candidate. Applying this rule to the present case, we conclude that the Chamber's advertisements do not expressly advocate the election or defeat of a candidate. This is true because the advertisements do not contain explicit terms advocating specific electoral action by viewers. As a consequence, the advertisements are not subject to mandatory disclosure requirements for independent campaign expenditures. Accordingly, we reverse the judgment of the district court.

I

In November 2000, four of the nine positions on the Mississippi Supreme Court were up for election. Less than one month before the election, the Chamber ran four thirty-second television advertisements, each extolling the virtues of a different candidate running for a position on the court. The advertisements featured three incumbents (former Chief Justice Lenore Prather, Justice Kay Cobb, and Justice James Smith) and one challenger (Judge Keith Starrett). The advertisements identified the candidate and described in general terms the candidate's judicial philosophy, back-

ground, qualifications, and other positive qualities. For example, the advertisements emphasized the candidates' "common sense" and their interest in protecting "victims' rights." [1] The advertisements concluded by displaying the address of an Internet web site, www.LitigationFairness.org, that contains a page with links to the campaign web sites of Justice Cobb and Judge Starrett and to pages containing biographical information for Justice Smith and former Chief Justice Prather. [2]

The election process for positions on the Mississippi Supreme Court is governed by Mississippi's election laws, which include regulations requiring reporting and disclosure of "independent expenditures" on candidates' campaigns. *See* Miss.Code. Ann. §§ 23-15-801 *et seq*. Because the Chamber did not report its expenditures on the advertisements to state election authorities, the Mississippi Attorney General and Secretary of State initiated an investigation to determine whether the advertisements violated the state election laws. [3] The Chamber brought an action in the District Court for the

---

[1] The audio portion of the advertisement featuring former Chief Justice Prather is typical:

> Lenore Prather—Chief Justice of Mississippi's Supreme Court.
>
> Lenore Prather—Using common sense principles to uphold the law.
>
> Lenore Prather—Putting victims rights ahead of criminals and protecting our Supreme Court from the influence of special interests.
>
> The first woman appointed to Mississippi's Supreme Court, Lenore Prather has 35 years experience on the bench.
>
> Lenore Prather. A fair and independent voice for Mississippi.

[2] The link for Justice Smith directs the viewer to a page on the Litigation Fairness site describing Justice Smith's background. The link for former Chief Justice Prather directs the viewer to her biography on the Mississippi Supreme Court web site.

[3] The state acknowledges that there is no evidence that the Chamber colluded with any of the candidates in developing the advertisements.

Southern District of Mississippi seeking declaratory relief from the application of the election regulations. The Chamber argued that application of the state regulations to its advertisements would impermissibly curtail its right to free speech.

The district court adopted a test first articulated by the Ninth Circuit in *Fed. Election Comm'n v. Furgatch,* 807 F.2d 857 (9th Cir.1987). It held that the advertisements were "express advocacy" because, in the context of the ongoing election campaign, no reasonable viewer would construe the advertisements as anything but a directive to vote for the featured candidates—notwithstanding that the advertisements' express words did not call for action on the part of the voter. The district court specifically found that the advertisements "clearly champion[ ] the election of a particular candidate" and "contain no true discussion of issues." It thus held that the Chamber's advertisements could be subject to state campaign regulations without offending the First Amendment. The Chamber now appeals.

II

Because the Chamber's challenge to Mississippi's mandatory disclosure statute follows a well-worn path, we begin with a brief discussion of the applicable caselaw. Our review of the Supreme Court decisions in this area leads us to the conclusion that mandatory disclosure provisions like that in the Mississippi statute apply only to communications containing words that *explicitly* advocate the election or defeat of a particular candidate. Because the advertisements at issue here do not contain such express advocacy, we conclude that the First Amendment protects these advertisements from governmental regulation.

A

Although the states, like the federal government, have authority to regulate elections and election campaigns, the

Supreme Court has held that the First Amendment constrains the government's power to compel the disclosure of independent contributions and expenditures, just as it constrains the government's power to regulate the amount of money that a person or group can contribute to or spend on election campaigns. *See Buckley v. Valeo,* 424 U.S. 1, 19, 60-61, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

In *Buckley,* candidates and political donors challenged the constitutionality of a federal election statute that imposed limits on individual campaign contributions, expenditures by candidates, and independent expenditures "relative to" specific candidates. Most relevant to our decision today, the Court also reviewed a provision of the statute requiring " '[e]very person (other than a political committee or candidate) who makes contributions or expenditures' aggregating over $100 in a calendar year 'other than by contribution to a political committee or candidate' to file a statement with the [Federal Election] Commission." *Buckley,* 424 U.S. at 74-75, 96 S.Ct. 612 (quoting 18 U.S.C. § 434(e) (1970 Supp. IV)). The Court observed that compelled disclosure of independent expenditures implicates the First Amendment because it "can seriously infringe on privacy of association and belief" and it can indirectly deter the exercise of First Amendment rights. *Id.* at 64-65, 96 S.Ct. 612. The Court recognized that the government has an important interest in providing the electorate with information about the sources of money spent during political campaigns and collecting data to enforce campaign laws. The Court nevertheless held that a provision requiring disclosure of independent campaign expenditures involves a "significant encroachment [ ] on First Amendment rights" and must therefore be subject to "exacting scrutiny." *Id.* at 64-67, 96 S.Ct. 612; *see also id.* at 75, 96 S.Ct. 612 ("In considering this provision [requiring disclosure of independent expenditures by individuals or groups], we must apply the same strict standard of scrutiny, for the right of associational

privacy developed in *NAACP v. Alabama* [357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)] derives from the rights of the organization's members to advocate their personal points of view in the most effective way.").

To ensure that the mandatory disclosure provision in the federal statute did not encroach on protected political speech by individuals and groups, the Court held that the provision *must be narrowly construed* to be consistent with the First Amendment. *Id.* at 80, 96 S.Ct. 612. Accordingly, the Court interpreted the provision to "apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." [4] *Id.* at 44, 96 S.Ct. 612. In a footnote, the Court then provided examples of terms of express advocacy: " 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' " *Id. at 44 n. 52, 96 S.Ct. 612.*

In *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 243, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("*MCFL*"), the Court applied the "express advocacy" standard to a newsletter that encouraged readers to "Vote Pro-Life" and listed the names of "pro-life" candidates in the election. Observing that the "express advocacy" standard is designed "to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons," the Court held that the newsletter contained "[j]ust such an exhortation." *Id.* The Court reasoned that an explicit directive to vote "pro-life" read in conjunction with named "pro-life" candidates was only "marginally less direct" than a specific exhortation to vote for the named candidates. *Id.*

---

[4] The Court articulated this standard in construing the section of the federal election statute limiting expenditures by individuals and groups "relative to a clearly identified candidate" to $1000 per calendar year. *Buckley,* 424 U.S. at 39, 96 S.Ct. 612. Later in its opinion, the Court adopted this standard during its review of the statute's mandatory disclosure provision. *See id.* at 77-80, 96 S.Ct. 612.

Thus, the *MCFL* Court extended the "express advocacy" inquiry to include consideration of the logical relationship between an express term advocating election or defeat and the names of specific candidates identified in the communication.

In reviewing the application and constitutionality of various state and federal election regulations, most Courts of Appeal have adopted the view that, under *Buckley* and *MCFL,* the government may regulate only those communications containing explicit words advocating the election or defeat of a particular candidate.[5] These courts rely primarily on *Buckley*'s emphasis on (1) the need for a bright-line rule demarcating the government's authority to

---

[5] *See Faucher v. Fed. Election Comm'n,* 928 F.2d 468, 470-71 (1st Cir.1991) ("Express advocacy is language which 'in express terms advocate[s] the election or defeat of a clearly identified candidate' through the use of such phrases as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' and 'reject.' " (quoting *Buckley,* 424 U.S. at 44 & n. 52, 96 S.Ct. 612)); *Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.,* 616 F.2d 45, 53 (2d Cir.1980) (en banc) (rejecting interpretation of federal election statute allowing FEC to regulate statements made "for the purpose, express or implied, of encouraging election or defeat"); *Fed. Election Comm'n v. Christian Action Network, Inc.,* 110 F.3d 1049, 1051 (4th Cir.1997) ("[T]he Federal Election Campaign Act [can] be applied consistently with the First Amendment only if it [is] limited to expenditures for communications that literally include words which in and of themselves advocate the election or defeat of a candidate."); *Iowa Right to Life Comm., Inc. v. Williams,* 187 F.3d 963, 969 (8th Cir.1999) ("The Supreme Court's focus was on whether the communication contains 'express' or 'explicit' words of advocacy for the election or defeat of a candidate."); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson,* 236 F.3d 1174, 1187 (10th Cir.2000) ("[C]ommunications that do not contain express words advocating the election or defeat of a particular candidate are deemed issue advocacy, which the First Amendment shields from regulation.").

regulate speech and (2) the need to ensure that regulation does not impinge on protected issue advocacy. [6]

The sole departure from this bright-line approach among our sister circuits came in *Fed. Election Comm'n v. Furgatch,* 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987) [7]. The Ninth Circuit summarized its holding in that case:

> We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no

---

[6] *See, e.g., Christian Action Network,* 110 F.3d at 1051 (noting that the *Buckley* Court "opted for the clear, categorical limitation, that only expenditures for communications using explicit words of candidate advocacy are prohibited, so that citizen participants in the political processes would not have their core First Amendment rights to political speech burdened by apprehensions that their advocacy of issues might later be interpreted by the government as, instead, advocacy of election result"); *Citizens for Responsible Gov't,* 236 F.3d at 1187 ("In order to counter the tendency of the line between protected 'issue advocacy' and regulable 'express advocacy' to 'dissolve in practical application,' the *Buckley* Court construed the allegedly vague statute at issue as applicable only 'to communications containing express words of advocacy of election or defeat'" (quoting *Buckley,* 424 U.S. at 44 & n. 52, 96 S.Ct. 612)); *Iowa Right to Life Comm.,* 187 F.3d at 969 ("To avoid uncertainty . . . the Supreme Court in *Buckley,* established a bright-line test . . . .").

[7] One district court and several state courts have also applied this approach. *See, e.g., Elections Bd. of State of Wis. v. Wisconsin Mfrs. & Commerce,* 227 Wis.2d 650, 597 N.W.2d 721, 732 (1999); *Osterberg v. Peca,* 12 S.W.3d 31, 53 (Tex.2000); *Federal Election Comm'n v. Nat'l Organization for Women,* 713 F.Supp. 428, 433 (D.D.C.1989); *cf. Federal Election Comm'n v. Christian Coalition,* 52 F.Supp.2d 45, 63-64 (D.D.C.1999) (holding that "[a]lthough the implicit message is unmistakable, in explicit terms [a statement in a fundraising letter] is prophecy rather than advocacy" and that a "scorecard" was not express advocacy because "a reasonable person could understand [the] statement to be a directive to engage in issue advocacy").

> other reasonable interpretation but as an exhortation to vote for or against a specific candidate.

Id. at 864. The court further elaborated:

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id. [8] Although the Ninth Circuit's approach does not stray far from other articulations of the "express advocacy" standard, it does introduce two elements not present in the limited inquiry endorsed by the other circuits: (1) "limited reference" to the context of the communication and (2) reference to whether "reasonable minds" could differ about the meaning of the communication.

These aspects of the Ninth Circuit's approach in *Furgatch* were essentially rejected by courts that adopted the bright-line rule requiring explicit words directing viewers to vote for or against a particular candidate. For example, in *Virginia Society for Human Life, Inc. v. Fed. Election Comm'n*, 263

---

[8] The *Furgatch* Court applied this analysis to a newspaper advertisement against then-President Jimmy Carter urging readers "Don't let him do it." The court concluded that the advertisement was express advocacy when read in context because "reasonable minds could not dispute that [the] advertisement urged readers to vote against Jimmy Carter." *Furgatch*, 807 F.2d at 864.

F.3d 379, 392 (4th Cir.2001), the Fourth Circuit found a federal regulation unconstitutionally overbroad because it defined express advocacy as a communication that, when taken as a whole, " 'could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s).'" The court held that "[t]he regulation goes too far because it shifts the determination of what is 'express advocacy' away from the words 'in and of themselves' to 'the unpredictability of audience interpretation.'" *Id.* at 392. The Eighth Circuit reached a similar conclusion when it found that an election regulation defining express advocacy according to "what reasonable people or reasonable minds would understand by the communication" was unconstitutional because the regulation "does not require express words of advocacy." *Iowa Right to Life,* 187 F.3d at 969.

We agree that the *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amendment as interpreted in *Buckley* and *MCFL.* [9] Instead, we iterate that the language of the communication must, by its express terms, exhort the viewer to take a specific electoral action for or against a particular candidate. *See Buckley,* 424 U.S. at 44, 96 S.Ct. 612 (interpreting federal election statute to "apply only to expenditures for communications that *in express terms* advocate the election or defeat of a clearly identified candidate" (emphasis added)). Although

---

[9] We also reject *amici*'s definition of express advocacy: "[W]hen an ad contains *only* an express endorsement of a candidate's qualifications for public office . . . and contains *no* discussion of any issue as a topic worthy of its own attention, then the ad is an 'electoral' rather than 'issue' ad." This definition involves an impermissible inquiry into what issues are "worthy" topics of discussion. We also note that neither *Buckley* nor *MCFL* adopted an "express endorsement" test. Indeed, such a test necessarily would encompass communications that contain no "express terms advocat[ing] the election or defeat of a clearly identified candidate." *Buckley,* 424 U.S. at 44, 96 S.Ct. 612.

application of this rule may require making straightforward connections between identified candidates and an express term advocating electoral action (as in *MCFL*), the focus must remain on the plain meaning of the words themselves.

We must admit, as the *Furgatch* Court correctly observed, that this narrow interpretation of "express advocacy" undoubtedly allows individuals and organizations to circumvent electoral regulations simply by omitting from their communications the genre of words and phrases that convey the same meaning as the words listed in *Buckley.* This observation, however, does not affect our reading of *Buckley.* Indeed, the *Buckley* Court recognized, for example, that confining the federal limitation on expenditures in this manner "undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder." *Buckley,* 424 U.S. at 45, 96 S.Ct. 612. The Court's overriding concern, however, was that a statute with an ambiguous scope would chill political discourse:

> "[T]he supposedly clear-cut distinction between discussion. laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

Id. at 43, 96 S.Ct. 612 (quoting *Thomas v. Collins,* 323 U.S. 516, 535, 65 S.Ct. 315, 89 L.Ed. 430 (1945)). To avoid this result, the Court emphasized the need for a clear line between regulated and unregulated speech under the statute. The Court adopted an "express advocacy" standard focusing on the explicit language of the communication because "the distinction between discussion of issues and candidates and

advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42, 96 S.Ct. 612.[10]

In sum, we believe that a narrow interpretation of "express advocacy" is faithful to the language and spirit of *Buckley* and *MCFL*. It clearly avoids the pitfalls of making application of the First Amendment dependent on the understanding of the reasonable person under the circumstances.[11] Accordingly, we hold that a communication constitutes "express advocacy"—and may therefore be subject to mandatory disclosure regulations—only if it contains explicit words advocating the election or defeat of a clearly identified candidate.

B

We now turn to apply these principles to this case. The Mississippi election statute at issue here provides that each person who makes aggregate "independent expenditures" of more than $200 during a calendar year must file a report with the state disclosing the amount and source of the expenditure and a statement that the expenditure was not made in

---

[10] *See also Iowa Right to Life*, 187 F.3d at 969 (recognizing the State's concern "that persons or organizations will surreptitiously advocate the election or defeat of a named candidate but avoid legitimate government regulation and reprisal by simply omitting 'magic words' of advocacy" but concluding that a bright-line test is required to avoid chilling free speech).

[11] The present case provides a good example of such pitfalls. In order to find that the advertisements here were subject to state regulation, the district court had to draw a distinction between the content of the advertisements and the court's view—as thoughtful as it may be—of "true issue advocacy." *Chamber of Commerce v. Moore*, No. 3:00-CV- 778WS, slip op. at 26, 2000 WL 33709454, at *12, — F.Supp.2d ——, —— (S.D.Miss.Nov. 2, 2000); *see also Furgatch*, 807 F.2d at 864 (concluding that an advertisement was not "issue-oriented speech" because it "directly attacks a candidate, not because of any stand on the issues of the election, but for his personal qualities and alleged improprieties in the handling of his campaign").

cooperation with a candidate. *See* Miss. Code Ann. § 23-15-809. "Independent expenditures" are defined in the statute as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate." Miss. Code Ann. § 23-15-801(j). Because the Mississippi legislature essentially adopted the language of the Supreme Court's decisions in *Buckley* and *MCFL* in drafting this statute, all that remains is to determine whether the Chamber's advertisements constitute "express advocacy" under the standard articulated above.

There is no question that the Chamber's advertisements do not contain any of the phrases that *Buckley* cites as examples of "express advocacy." Nor do the advertisements contain other explicit words advocating the election of the featured candidates or exhorting viewers to take specific electoral action during the elections. Indeed, the advertisements do not refer at all to the impending elections.

Amici nevertheless argue that the Chamber's advertisements are express advocacy because their "express content, when considered as a whole, unambiguously constitutes an endorsement of a particular candidate for public office." Observing that neither *Buckley* nor *MCFL* requires "succinct advocacy," *amici* argue that the advertisements' references to positive attributes of specific candidates are sufficient to bring the advertisements within the scope of the statute—despite the absence of explicit words directing viewers to take a specific action.[12] The State and *amici* also point out that the

---

[12] *Amici* also argue that the advertisements must be express advocacy because they do not meaningfully discuss public issues and thus cannot be considered issue advocacy. This argument incorrectly assumes that express advocacy is defined as the absence of issue advocacy. As explained above, the nature of the language in the communication—that is, the presence or absence of explicit words advocating the election or

advertisements presented only favorable information about the candidates. Because the "essential nature" of each advertisement is an endorsement of the named candidate, *amici* contend that the advertisements may be subjected to disclosure requirements without offending the First Amendment.

We think it is clear that the examples of express advocacy listed in the *Buckley* footnote are illustrative rather than exhaustive because there are a variety of other words and phrases that convey precisely the same meaning.[13] But *express* advocacy necessarily requires the use of language that explicitly and by its own terms advocates the election or defeat of a candidate. If the language of the communication contains no such call to action, the communication cannot be "express advocacy." Thus, communications that discuss in glowing terms the record and philosophy of specific candidates, like the advertisements at issue here, do not constitute express advocacy under *Buckley* and *MCFL* unless they also contain words that exhort viewers to take specific electoral action for or against the candidates. *Cf. Clifton v. Fed. Election Comm'n,* 114 F.3d 1309, 1311 (1st Cir.1997) ("[A]s glossed by the Supreme Court to avoid 'overbreadth' [in *MCFL*], the [federal election] statute does not prevent corporations and unions from engaging in issue advocacy including publication of the records and positions of federal election candidates.").

---

defeat of a specific candidate—determines whether it constitutes issue advocacy or express advocacy.

[13] *Cf. Christian Coalition,* 52 F.Supp.2d at 65 ("While the 'express advocacy' standard is susceptible of circumvention by all manner of linguistic artifice, merely changing the verb 'vote' into the noun, 'trip to the voting booth' is insufficient to escape the limited reach of 'express advocacy.' "); *Furgatch,* 807 F.2d at 863 (noting that the phrases listed in *Buckley* "do[ ] not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate").

The state emphasizes that the Chamber's advertisements aired on the eve of the elections for the supreme court and were virtually identical to the candidates' own advertisements—except that they omitted the phrase "vote for [the featured candidate]," which appeared at the end of the candidates' advertisements. The state contends that these facts, viewed together with the content of the Chamber's advertisements, supports its position that the advertisements constitute express advocacy. Indeed, *amici* argue that the advertisements "make no sense except in the context of an election campaign." We do not necessarily gainsay this observation.

As the above discussion makes clear, however, these contextual factors are irrelevant to our determination whether the advertisements contain express advocacy. The Court in *MCFL* did not rely on the factual context in which the communication was made in determining whether it contained express advocacy.[14] Instead, it held that courts reviewing a communication may consider the logical relationship between an *express term* advocating specific electoral action and the names of candidates clearly identified in the communication. We therefore do not believe that *MCFL* retreated from the requirement that express advocacy must contain explicit words advocating electoral action. *See MCFL*, 479 U.S. at 249, 107 S.Ct. 616 (noting that *Buckley* concluded that "a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc."). In any event, even under the test articulated in

---

[14] The state suggests that the *MCFL* Court took timing into account in its review of the "Special Edition" newsletter at issue in that case. While the Court did observe that the special edition was released to coincide with an election and had a higher circulation than normal editions of the newsletter, the Court did not rely on these facts in concluding that the newsletter contained express advocacy. *See MCFL*, 479 U.S. at 249-50, 107 S.Ct. 616.

Furgatch, the timing of the advertisements (or other contextual factors) cannot transform general informational statements about candidates into a call for specific electoral action. *See Furgatch,* 807 F.2d at 864 ("[S]peech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act."); *see also id.* at 863 ("Context remains a consideration, an ancillary one, peripheral to the words themselves.").

Amici also suggest that statements in the advertisements like "Lenore Prather—A fair and independent voice for Mississippi" are only "marginally less direct" than "Smith for Congress," which is listed among the examples of express advocacy in *Buckley.* Because neither phrase includes a verb like "vote" or "elect," *amici* reason that both phrases depend on their context to convey meaning. We find this argument unpersuasive because the two phrases are not synonymous: The first connects a name to a positive character trait while the second connects a name to an elected office. As we noted above, favorable statements about a candidate do not constitute express advocacy, even if the statements amount to an endorsement of the candidate. [15] Even assuming that the phrases were roughly equivalent, "Smith for Congress" has an accepted meaning that does not vary with context. In contrast, the meaning of the phrases in the advertisements could conceivably mean "vote for Candidate X" only when considered in the context of an event extraneous to the four corners of the advertisement. Because such contextual factors are irrelevant to our inquiry, the meaning of phrases such as "Judge Keith Starrett—a common sense justice" is at best

---

[15] Following the logic of *amici*'s argument, any laudatory phrase uttered in connection with a candidate's name during election season would be the equivalent of "Smith for Congress." We think that this broad interpretation of express advocacy runs counter to the Supreme Court's stated concerns about the overbreadth of government regulation of political speech. *See Buckley,* 424 U.S. at 42-43, 64-67, 80, 96 S.Ct. 612.

ambiguous—unless matters outside the advertisement are taken into account—and cannot constitute express advocacy.

Finally, the State suggests that, even if the content of the advertisements does not expressly advocate the election of the featured candidates, the web site referenced in the commercials (www.LitigationFairness.org) did so because it included a page directing viewers to two of the candidates' campaign web sites under the heading "Mississippi Candidate Information." The State argues that we must consider this form of indirect advocacy in determining whether the advertisements themselves are express advocacy. However, the LitigationFairness.org site did not itself contain any statements advocating the election or defeat of candidates. As a result, we find that the connection between the advertisements and the candidates' official sites is simply too tenuous to make the advertisements "express advocacy."

Because the Chamber's advertisements do not contain explicit words exhorting viewers to take specific electoral action for or against the featured candidates, we hold that the advertisements do not constitute "express advocacy" under the bright line approach adopted above. [16] As a consequence, the district erred in holding that the advertisements are subject to mandatory disclosure under the Mississippi election statute.

III

We recognize that the result we reach in this case may be counterintuitive to a commonsense understanding of the message conveyed by the television political advertisements

---

[16] *Cf. Perry v. Bartlett,* 231 F.3d 155, 159-61 (4th Cir.2000) (finding that advertisements that were critical of certain candidates but that "but did not expressly exhort voters to take a particular electoral action" were not express advocacy, despite the fact that the sponsor admitted outside the advertisement that it sought to defeat the candidates), *cert. denied,* 532 U.S. 905, 121 S.Ct. 1229, 149 L.Ed.2d 138 (2001).

at issue. Nevertheless, the result is compelled by the First Amendment, as interpreted by the Supreme Court in its effort to . .lance the state's interest in regulating elections with the constitutional right of free speech. Accordingly, for the foregoing reasons, we hold that the First Amendment protects the Chamber's advertisements, and consequently the advertisements are not subject to regulation under the Mississippi election statute. Accordingly, the judgment of the district court is REVERSED and the case is REMANDED for entry of judgment for the plaintiff-appellant.

REVERSED and REMANDED for entry of judgment.

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE
OF MISSISSIPPI

Clerk's Docket 2000-M-01839

CHAMBER OF COMMERCE THE UNITED STATES OF AMERICA

v.

FRANK G. VOLLOR

Hinds Chancery Court District 1

Trail Court Case # G-2000-2128 S/2

The Honorable William Hale Singletary

Ruling Date 11/3/2000

Petitioner Parties

Represented By:

Paul Kelly Loyacono

CHAMBER OF COMMERCE THE UNITED STATES OF AMERICA

Represented By:

Michael B. Wallace
Christopher R. Green

Resondent Parties

Frank G. Vollor Pro Se

Other Parties

United States of America Pro Se

WABG-TV, Greenville, MS Pro Se

WXVT-TV, Greenville, MS Pro Se

WAPT-TV, Jackson, MS Pro Se

WJTV-TV, Jackson, MS Pro Se

WLBT-TV, Jackson, Ms Pro Se

WDBD-TV, Jackson, MS Pro Se

WTOK-TV, Meridian, MS Pro Se

WCBI-TV Columbus, MS Pro Se

General Docket

11/3/2000	Motion #2000-5015 Petition for Interlocutory Appeal by Permission or, in the Alternative, for Writ of Mandamus or Prohibition
11/3/2000	Motion #2000-5016 Motion for Stay of Proceedings Pending Dispostion of Petition for Interlocutory Appeal
11/3/2000	Order Entered Motion #2000-5016
6/1/2001	Action of U.S. Supreme Court

MISSISSIPPI ELECTION STATUTES
(Excerpts)

Mississippi Code Annotated § 23-15-801 (2000).

Definitions

* * * *

(c) "Political committee" shall mean any committee, party, club, association, political action committee, campaign committee or other groups of persons or affiliated organizations which receives contributions aggregating in excess of Two Hundred Dollars ($200.00) during a calendar year or which makes expenditures aggregating in excess of Two Hundred Dollars ($200.00) during a calendar year for the purpose of influencing or attempting to influence the action of voters for or against the nomination for election, or election, of one or more candidates, or balloted measures and shall, in addition, include each political party registered with the Secretary of State.

* * * *

(e)(i) "Contribution" shall include any gift, subscription, loan, advance or deposit of money or anything of value made by any person or political committee for the purpose of influencing any election for elective office or balloted measure;

(ii) "Contribution" shall not include the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee; or the cost of any food or beverage for use in any candidate's campaign or for use by or on behalf of any political committee of a political party;

(iii) "Contribution to a political party" includes any gift, subscription, loan, advance or deposit of money or anything of value made by any person, political committee, or other organization to a political party and to any committee,

subcommittee, campaign committee, political committee and other groups of persons and affiliated organizations of the political party.

(iv) "Contribution to a political party" shall not include the value of services provided without compensation by any individual who volunteers on behalf of a political party or a candidate of a political party.

(f)(i) "Expenditure" shall include any purchase, payment, distribution, loan, advance, deposit, gift of money or anything of value, made by any person or political committee for the purpose of influencing any balloted measure or election for elective office; and a written contract, promise, or agreement to make an expenditure;

(ii) "Expenditure" shall not include any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate; or nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) "Expenditure by a political party" includes 1. any purchase, payment, distribution, loan, advance, deposit, gift of money or anything of value, made by any political party and by any contractor, subcontractor, agent, and consultant to the political party; and 2. a written contract, promise, or agreement to make such an expenditure.

* * * *

(j) The term "independent expenditure" shall mean an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate.

(k) The term "clearly identified" shall mean that:

(i) The name of the candidate involved appears; or

(ii) A photograph or drawing of the candidate appears; or

(iii) The identity of the candidate is apparent by unambiguous reference.

Mississippi Code Annotated § 23-15-803 (2000).

Political committee statements

(a) Statements of organization. Each political committee shall file a statement of organization no later than ten (10) days after receipt of contributions aggregating in excess of Two Hundred Dollars ($200.00), or no later than ten (10) days after having made expenditures aggregating in excess of Two Hundred Dollars ($200.00).

(b) Contents of statements. The statement of organization of a political committee shall include:

(i) The name and address of the committee and all officers;

(ii) Designation of a director of the committee and a custodian of books and accounts of the committee, who shall be designated treasurer; and

(iii) If the committee is authorized by a candidate, the name, address, office sought, and party affiliation of the candidate.

(c) Change of information in statements. Any change in information previously submitted in a statement of organization shall be reported and noted on the next regularly scheduled report.

Mississippi Code Annotated § 23-15-807 (2000).

Who must report; when; contents

(a) Each candidate or political committee shall file reports of contributions and disbursements in accordance with the provisions of this section. All candidates or political committees required to report may terminate its obligation to

report only upon submitting a final report that it will no longer receive any contributions or make any disbursement and that such candidate or committee has no outstanding debts or obligations. The candidate, treasurer or chief executive officer shall sign each such report.

* * * *

(d) Contents of reports. Each report under this article shall disclose:

(i) For the reporting period and the calendar year, the total amount of all contributions and the total amount of all expenditures of the candidate or reporting committee which shall include those required to be identified pursuant to item (ii) of this paragraph as the total of all other contributions and expenditures during the calendar year. Such reports shall be cumulative during the calendar year to which they relate;

(ii) The identification of:

1. Each person or political committee who makes a contribution to the reporting candidate or political committee during the reporting period, whose contribution or contributions within the calendar year have an aggregate amount or value in excess of Two Hundred Dollars ($200.00) together with the date and amount of any such contribution;

2. Each person or organization, candidate or political committee who receives an expenditure, payment or other transfer from the reporting candidate, political committee or its agent, employee, designee, contractor, consultant or other person or persons acting in its behalf during the reporting period when the expenditure, payment or other transfer to such person, organization, candidate or political committee within the calendar year have an aggregate value or amount in excess of Two Hundred Dollars ($200.00) together with the date and amount of such expenditure.

(iii) The total amount of cash on hand of each reporting candidate and reporting political committee;

* * * *

(e) The appropriate office specified in Section 23-15-805 must be in actual receipt of the reports specified in this article by 5:00 p.m. on the dates specified in paragraph (b) of this section. If the date specified in paragraph (b) of this section shall fall on a weekend or legal holiday then the report shall be due in the appropriate office at 5:00 p.m. on the first working day before the date specified in paragraph (b) of this section. The reporting candidate or reporting political committee shall ensure that the reports are delivered to the appropriate office by the filing deadline. The Secretary of State may approve specific means of electronic transmission of completed campaign finance disclosure reports, which may include, but not be limited to, transmission by electronic facsimiles (FAX) devices.

* * * *

Mississippi Code Annotated § 23-15-809.

Independent expenditures

(a) Every person who makes independent expenditures in an aggregate amount or value in excess of Two Hundred Dollars ($200.00) during a calendar year shall file a statement containing the information required under Section 23-15-807. Such statement shall be filed with the appropriate offices as provided for in Section 23-15-805, and such person shall be considered a political committee for the purpose of determining place of filing.

(b) Statements required to be filed by this section shall include:

(i) Information indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(ii) Under penalty of perjury, a certification of whether or not such independent expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(iii) The identification of each person who made a contribution in excess of Two Hundred Dollars ($200.00) to the person filing such statement which was made for the purpose of furthering an independent expenditure.

Mississippi Code Annotated § 23-15-811 (2000).

Sanctions

(a) Any candidate or any other person who shall willfully and deliberately and substantially violate the provisions and prohibitions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine in a sum not to exceed Three Thousand Dollars ($3,000.00) or imprisoned for not longer than six (6) months or by both fine and imprisonment.

(b) In addition to the penalties provided in paragraph (a) of this section, any candidate or political committee which is required to file a statement or report which fails to file such statement or report on the date in which it is due may be compelled to file such statement or report by an action in the nature of a mandamus.

(c) No candidate shall be certified as nominated for election or as elected to office unless and until he files all reports required by this article due as of the date of certification.

(d) No candidate who is elected to office shall receive any salary or other remuneration for the office unless and until he files all reports required by this article due as of the date such salary or remuneration is payable.

(e) In the event that a candidate fails to timely file any report required pursuant to this article but subsequently files a report or reports containing all of the information required to be reported by him as of the date on which the sanctions of paragraphs (c) and (d) of this section would be applied to him, such candidate shall not be subject to the sanctions of said paragraphs (c) and (d).

Mississippi Code Annotated § 23-15-813 (2000).

Civil penalties and proceedings

(a) In addition to any other penalty permitted by law, the Secretary of State shall require any candidate or political committee, as identified in Section 23-15-805(a), and any other political committee registered with the Secretary of State, who fails to file a campaign finance disclosure report as required under Sections 23-15-801 through 23-15-813, or Sections 23-17-47 through 23-17-53, or who shall file a report which fails to substantially comply with the requirements of Sections 23-15-801 through 23-15-813, or Sections 23-17-47 through 23-17-53, to be assessed a civil penalty as follows:

(i) Within five (5) calendar days after any deadline for filing a report pursuant to Sections 23-15-801 through 23-15-813, or Sections 23-17-47 through 23-17-53, the Secretary of State shall compile a list of those candidates and political committees who have failed to file a report. The Secretary of State shall provide each candidate or political committee, who has failed to file a report, notice of the failure by first-class mail.

(ii) Beginning with the tenth calendar day after which any report shall be due, the Secretary of State shall assess the delinquent candidate and political committee a civil penalty of Fifty Dollars ($50.00) for each day or part of any day until a valid report is delivered to the Secretary of State, up to a maximum of ten (10) days. However, in the discretion of the

Secretary of State, the assessing of the fine may be waived in whole or in part if the Secretary of State determines that unforeseeable mitigating circumstances, such as the health of the candidate, interfered with timely filing of a report. Failure of a candidate or political committee to receive notice of failure to file a report from the Secretary of State is not an unforeseeable mitigating circumstance, and failure to receive the notice shall not result in removal or reduction of any assessed civil penalty.

(iii) Filing of the required report and payment of the fine within ten (10) calendar days of notice by the Secretary of State that a required statement has not been filed, constitutes compliance with Sections 23-15-801 through 23-15-813, or Sections 23-17-47 through 23-17-53.

(iv) Payment of the fine without filing the required report does not in any way excuse or exempt any person required to file from the filing requirements of Sections 23-15-801 through 23-15-813, and Sections 23-17-47 through 23-17-53.

(v) If any candidate or political committee is assessed a civil penalty, and the penalty is not subsequently waived by the Secretary of State, the candidate or political committee shall pay the fine to the Secretary of State within ninety (90) days of the date of the assessment of the fine. If, after one hundred twenty (120) days of the assessment of the fine the payment for the entire amount of the assessed fine has not been received by the Secretary of State, the Secretary of State shall notify the Attorney General of the delinquency, and the Attorney General shall file, where necessary, a suit to compel payment of the civil penalty.

(b)(i) Upon the sworn application, made within sixty (60) calendar days of the date upon which the required report is due, of a candidate or political committee against whom a civil penalty has been assessed pursuant to paragraph (a), the Secretary of State shall forward the application to the State

Board of Election Commissioners. The State Board of Election Commissioners shall appoint one or more hearing officers who shall be former chancellors, circuit court judges, judges of the Court of Appeals or justices of the Supreme Court, and who shall conduct hearings held pursuant to this article. The hearing officer shall fix a time and place for a hearing and shall cause a written notice specifying the civil penalties that have been assessed against the candidate or political committee and notice of the time and place of the hearing to be served upon the candidate or political committee at least twenty (20) calendar days before the hearing date. The notice may be served by mailing a copy thereof by certified mail, postage prepaid, to the last known business address of the candidate or political committee.

(ii) The hearing officer may issue subpoenas for the attendance of witnesses and the production of books and papers at the hearing. Process issued by the hearing officer shall extend to all parts of the state and shall be served by any person designated by the hearing officer for the service.

(iii) The candidate or political committee has the right to appear either personally, by counsel or both, to produce witnesses or evidence in his behalf, to cross-examine witnesses and to have subpoenas issued by the hearing officer.

(iv) At the hearing, the hearing officer shall administer oaths as may be necessary for the proper conduct of the hearing. All hearings shall be conducted by the hearing officer, who shall not be bound by strict rules of procedure or by the laws of evidence in the conduct of the proceedings, but the determination shall be based upon sufficient evidence to sustain it. The scope of review at the hearing shall be limited to making a determination of whether failure to file a required report was due to an unforeseeable mitigating circumstance.

(v) Where, in any proceeding before the hearing officer, any witness fails or refuses to attend upon a subpoena issued by the commission, refuses to testify, or refuses to produce any books and papers the production of which is called for by a subpoena, the attendance of the witness, the giving of his testimony or the production of the books and papers shall be enforced by any court of competent jurisdiction of this state in the manner provided for the enforcement of attendance and testimony of witnesses in civil cases in the courts of this state.

(vi) Within fifteen (15) calendar days after conclusion of the hearing, the hearing officer shall reduce his or her decision to writing and forward an attested true copy of the decision to the last known business address of the candidate or political committee by way of United States first-class, certified mail, postage prepaid.

(c)(i) The right to appeal from the decision of the hearing officer in an administrative hearing concerning the assessment of civil penalties authorized pursuant to this section is granted. The appeal shall be to the Circuit Court of Hinds County and shall include a verbatim transcript of the testimony at the hearing. The appeal shall be taken within thirty (30) calendar days after notice of the decision of the commission following an administrative hearing. The appeal shall be perfected upon filing notice of the appeal and by the prepayment of all costs, including the cost of the preparation of the record of the proceedings by the hearing officer, and the filing of a bond in the sum of Two Hundred Dollars ($200.00), conditioned that if the decision of the hearing officer be affirmed by the court, the candidate or political committee will pay the costs of the appeal and the action in court. If the decision is reversed by the court, the Secretary of State will pay the costs of the appeal and the action in court.

(ii) If there is an appeal, the appeal shall act as a supersedeas. The court shall dispose of the appeal and enter

its decision promptly. The hearing on the appeal may be tried in vacation, in the court's discretion. The scope of review of the court shall be limited to a review of the record made before the hearing officer to determine if the action of the hearing officer is unlawful for the reason that it was 1. not supported by substantial evidence, 2. arbitrary or capricious, 3. beyond the power of the hearing officer to make, or 4. in violation of some statutory or constitutional right of the appellant. The decision of the court may be appealed to the Supreme Court in the manner provided by law.

(d) If, after forty-five (45) calendar days of the date of the administrative hearing procedure set forth in paragraph (b), the candidate or political committee identified in paragraph (a) of this section fails to pay the monetary civil penalty imposed by the hearing officer, the Secretary of State shall notify the Attorney General of the delinquency. The Attorney General shall investigate the offense in accordance with the provisions of this chapter, and where necessary, file suit to compel payment of the unpaid civil penalty.

(e) If, after twenty (20) calendar days of the date upon which a campaign finance disclosure report is due, a candidate or political committee identified in paragraph (a) of this section shall not have filed a valid report with the Secretary of State, the Secretary of State shall notify the Attorney General of those candidates and political committees who have not filed a valid report, and the Attorney General shall thereupon prosecute the delinquent candidates and political committees.

Mississippi Code Annotated § 23-15-1021 (2000).

Judicial office donation limits

It shall be unlawful for any individual or political action committee not affiliated with a political party to give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property in excess of Two Thousand Five

Hundred Dollars ($2,500.00) for the purpose of aiding any candidate or candidate's political committee for judge of a county, circuit or chancery court or in excess of Five Thousand Dollars ($5,000.00) for the purpose of aiding any candidate or candidate's political committee for judge of the Court of Appeals or justice of the Supreme Court, or to give, donate, appropriate of furnish directly or indirectly, any money, security, funds or property in excess of Two thousand Five Hundred Dollars ($2,500.00) to any candidate or the candidate's political committee for judge of a county, circuit or chancery court or in excess of Five Thousand Dollars ($5,000.00) for the purpose of aiding any candidate or candidate's political committee for judge of the Court of Appeals or justice of the Supreme Court, as a contribution to the expense of a candidate for judicial office.

Mississippi Code Annotated § 97-13-15 (2000).

Prohibited political contributions by corporations

It shall be unlawful for any corporation, incorporated company or incorporated association, by whatever name it may be known, incorporated or organized under the laws of this state, or doing business in this state, or for any servant, agent, employee or officer thereof, to give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property of said corporation, incorporated company or incorporated association, in excess of One Thousand Dollars ($1,000.00) per calendar year for the purpose of aiding any political party or any candidate for any public office, or any candidate for any nomination for any public office of any political party, or to give, donate, appropriate or furnish, directly or indirectly, any money, security, funds or property of said corporation, incorporated company or association in excess of One Thousand Dollars ($1,000.00) to any committee or person as a contribution to the expense of any political party or any candidate, representative or committee of any political party or

candidate for nomination by any political party, or any committee or other person acting in behalf of such candidate. The limit of One Thousand Dollars ($1,000.00) for contributions to political parties, candidates and committees or other persons acting in behalf such candidates shall be an annual limitation applicable to each calendar year.

Mississippi Code Annotated: § 97-13-17 (2000).

Penalty for illegal corporate contributions

Any corporation, incorporated company or incorporated association, or agent, officer or employee violating any of the provisions of section 97-13-15 shall, upon conviction, be fined not less than one thousand dollars ($1,000.00) nor more than five thousand dollars ($5,000.00).

(2)

Supreme Court, U.S.
FILED
SEP 3 2002
CLERK

01-1649

No.

In the

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA
Petitioner,

v.

BILLY JOE LANDRUM,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS TUCKER BUCHANAN
Counsel of Record
531 North 5th Avenue
P.O. Box 4326
Laurel, Mississippi 39441

Counsel for Respondent

16 pp

TABLE OF CONTENTS

Table of Contents	i
Table of Cited Authorities	ii
Introduction	1
Statement of the Case	2
Reasons for Denying the Writ	6
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Buckley v. Valeo, 424 U.S. 1 (1976) 10

Golden v. Zwickler, 394 U.S. 103, 109 (1969) 8

Jefferson v. City of Tarrant, Alabama, 522 U.S. 75, 81 (1997) 6

Norman v. Reed, 502 U.S. 279, 288 (1992) 8

Oil Workers Unions v. Missouri, 361 U.S. 363, 368-369, 371 (1960) 8

Weinstein v. Bradford, 423 U.S. 147, 149 (1975) 8

Statutes:

28 U.S.C. § 1257 1,6

INTRODUCTION

Although the petition purports to present a question of some importance as to the circumstances in which a court is permitted by the First Amendment to enjoin the massive expenditure of money designed to affect the outcome of a state election in violation of state law, this case is not an appropriate one to decide that question for a series of interrelated reasons. First, the appeal is from a decision of a state court, and there is no final judgment in the case as required by 28 U.S.C. § 1257. Second, the injunction from which the appeal arises has been dissolved, and there is no reasonable likelihood that a similar dispute will arise involving these parties that would prevent the case from being moot. Third, the substantive legal issues raised by the injunction are now pending before this Court in a petition for writ of certiorari by the State of Mississippi in response to the denial by the 5th Circuit Court of Appeals for a rehearing en banc, and are likely to be resolved in a way that will make it clear either that petitioner can or cannot make the kind of expenditures at issue in this case, and so the case is also unlikely to arise again with any other party besides this respondent.

Fourth, the factual record in this case is extremely sparse, and hence this Court would be deciding the prior restraint question in an almost hypothetical manner. Fifth, the procedural posture of this case as the third of four cases in which temporary restraining orders were granted shortly before an election, and then traveled different appellate paths before the orders were dissolved, makes this a particularly inappropriate vehicle for passing on the questions presented. To the extent that the Court believes that the petition presents recurring issues of importance, they can be dealt with much more appropriately in another case where the myriad problems involved here are absent.

STATEMENT OF THE CASE

In general, the petition contains most of the facts necessary for the Court to decide whether to grant review. However, the presentation tends to gloss over those aspects of the record that point out why review is inappropriate. Accordingly, respondent will briefly summarize the relevant facts and proceedings.

The petitioner Chamber of Commerce of the United States began running frequent television advertisements in favor of certain Mississippi Supreme Court candidates on or about October 17, 2000, three weeks before the election for each of the four seats

on the Court that were being contested. Six days later, the Chamber filed a declaratory judgment action against the State of Mississippi and certain state officials in the United States District Court for the Southern District of Mississippi. After an expedited hearing requested by the Chamber, that Court ruled on Thursday, November 2, five days before the election, that the Chamber's advertisements were not immune on First Amendment grounds from Mississippi's campaign finance laws.

The following day, November 3, the Hon. Frank Vollor, who was the opponent of Justice Jim Smith, sought and obtained a temporary restraining order in the Chancery Court of Hinds County, Mississippi, to prohibit the Chamber from running further advertisements in support of Justice Smith in violation of Mississippi law. The next day, November 4, a similar TRO was issued by the Chancery Court of Harrison County, at the request of Justice Oliver Diaz, who was running against the Hon. Keith Starrett (supported by the Chamber), and the respondent, the Hon. Billy Joe Landrum. On the following day, November 5, a similar TRO was sought by respondent and granted by the Chancery Court of Jones County in that same election. That order stated that, because of insufficient time, it was being granted without notice to

the Chamber. And on November 6, a further TRO was issued against the Chamber at the behest of a Mississippi citizen who claimed that his rights were being infringed by the Chamber's illegal expenditures. All of these TROs, including the one that is the subject of this petition, were stayed on November 6 by Justice Scalia, and the Chamber resumed broadcasting them and continued to do so through the November 21st runoff election.

This petition challenges the legality of one of the four TROs granted by the Mississippi Chancery Court – that issued against respondent Landrum. When this case was filed, respondent was a candidate for the Mississippi Supreme Court, but he lost in that election, and that election is over. Respondent is now, and has been for 16 years a Circuit Court judge in Mississippi and for 12 years before that he was a county judge. He is now 69 years of age, and he has authorized counsel to represent to this Court that he is highly unlikely to seek election to any other court (he is unopposed in his Circuit Court race for re-election this year).

Despite the obvious problems of mootness, petitioner appealed the legality of the stayed and now dissolved TRO for a since completed election to the Mississippi Supreme Court, which rejected the appeal because the Chamber chose to by-pass the

Mississippi Supreme Court and proceed directly to this Court. The Mississippi Supreme Court did not dismiss the case entirely or affirm the judgment below. Instead, it remanded for further proceedings consistent with its ruling. Respondent then moved to file an amended complaint, eliminating his claim for injunctive relief, and in its place, seeking money damages against the Chamber for the harm it caused him through its illegal campaign expenditures and related unlawful activities.

Then, seventeen months after the case was brought, the Chamber tardily removed the case to federal court on diversity of citizenship grounds. Although respondent was prepared to move to remand, the district court immediately stayed all proceedings (including any motions to remand), pending the outcome of the petition for certiorari and the proceedings in the Fifth Circuit described in the petition and discussed below.

Throughout this case and the related ones, the Chamber has contended that it had not violated Mississippi law because it had not engaged in express advocacy as a matter of Mississippi law and because, in any event, the First Amendment permits it to spend money for the kind of advertisements that it was making, even if state law prohibits it. The petition is quite adamant in disclaiming

any desire to have those issues resolved in this case because they are the subject of the Chamber's own lawsuit in federal court. Indeed, it has prevailed before a panel of the Fifth Circuit, and the petition for rehearing by the Mississippi Attorney General and others has been denied, but is on appeal to this Court by a petition for writ of certiorari. As the parties have recognized in agreeing to a stay of the removed claim in this case, the outcome of the Chamber's federal case will profoundly impact the remaining claim for damages.

But the Chamber's federal case is also important to this case because since it prevailed in the Fifth Circuit, and if it prevails in this Court, under either state or federal law, it will no longer have any need to fear any state court injunctions of the kind that were issued here, from respondent or from anyone else.

REASONS FOR DENYING THE WRIT

1. There is no final judgment in this case as required by 28 U.S.C. § 1257 and decisions of this Court such as *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81 (1997). Although the issue of the TRO is no longer in the case, the case is not over because the Mississippi Supreme Court ordered a remand. Then,

on remand, respondent moved to amend his complaint, and the Chancery Court permitted him to do so. Petitioner then removed the amended complaint to the federal court, relying on the same diversity of citizenship grounds that have always existed (assuming the Chamber does not claim that the value of the original controversy over its massive television advertisement campaign was less than $75,000).[1] Because there is a stay entered by the district court, respondent has not filed a motion to remand, but even if that motion should be denied, the case would still be pending in federal court. Whether a certiorari petition from a federal district court to this Court might have any basis in any case (and none has been filed in this one), there would be no extraordinary reason for this Court to accept an interlocutory review from a district court where there is no injunction pending and none ever likely to be granted in this case.

2. Even if there were a final judgment, the claim for injunctive relief in this case is clearly moot as between these parties. As noted above, it is highly unlikely that respondent will seek election as a Justice of the Mississippi Supreme Court again,

---

[1] See "Debate Over Tort Reform Ongoing", *The Clarion-Ledger*, June 19, 2001, pp 1a, 4a (reporting that Chamber spent $958,000 on Mississippi Supreme Court elections).

given his age and his status as a sitting judge. He is currently running unopposed for Circuit Court judge, and there is no claim by the Chamber that it will make any expenditures against him in that race that might conceivably cause him to seek injunctive relief of the kind that he sought here. Therefore, he has no current stake in the debate over the legality of the TRO, and hence there is no Article III case or controversy over it. Any claim by the Chamber that it will suffer future harm is "wholly conjectural." *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). *See also, Oil Workers Unions v. Missouri*, 361 U.S. 363, 368-369, 371 (1960) (where an allegedly unconstitutional injunction against a labor strike had expired by its own terms, the case was moot despite the possibility of future injunctions against the labor unions that were involved). As a practical matter, there is "no reasonable expectation that the same complaining party [will] be subjected to the same action again," *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), and certainly not at the hands of the appellee here. *Cf. Norman v. Reed*, 502 U.S. 279, 288 (1992) (case not moot because "[t]here would be every reason to expect *the same parties* to generate a similar, future controversy").

There is another reason why, even if the Chamber expected to run similar ads against some other judicial candidate in the future, there is no reasonable likelihood that a case remotely similar to this one would arise. The principal substantive issue on which the parties differed in all four TRO cases is whether, as a matter first of state law and then of First Amendment law, Mississippi could forbid the Chamber from running the kind of ads that it ran in connection with the 2000 elections for Justices of the Mississippi Supreme Court. Those issues are now before this Court by Mississippi's appeal of the Fifth Circuit's denial of the petition for rehearing en banc, and perhaps this Court will resolve them in a way that everyone will know whether the Chamber can or can not run similar ads in the future. As it stands currently, the Fifth Circuit has found in favor of the Chamber. But whatever the answer, everyone will comply with the law, and there will be no similar lawsuit to this one, further underscoring why this case is moot.

3. Respondent does not disagree that the standard for enjoining political speech places a very heavy burden on the party seeking the injunction because of this Court's prior restraint rulings. Respondent also recognizes that expenditures related to

elections are entitled to First Amendment protection, consistent with this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), and the cases that have followed it. But that does not neuter every court from the power to enjoin the expenditure of money for election related purposes, simply because the party seeking to make the expenditure claimed First Amendment status for it.

For example, suppose in this case the Chamber (or a non-U.S. corporation) had sought to run ads that clearly constituted express advocacy, either because it did not fear criminal prosecution or was willing to pay the fine as a cost of obtaining a Mississippi Supreme Court to its liking. Assume further that under state law, once an election is concluded, the courts would have no power to overturn it, even where the claim was that massive illegal expenditures resulted in a very close victory for one candidate over another. A candidate seeking an injunction in such a situation would bear a heavy burden, but there is no decision of this Court that would clearly and absolutely foreclose the possibility of such relief, and indeed even the petition recognized (18-19) that the law against prior restraints is not absolute.

Yet the petition asks this Court to rule on the scope of the prior restraint doctrine in a context totally devoid of facts (because

the case came up on a TRO) and in which the key legal issues noted above are currently unresolved, but will be resolved in the near future. Thus, as presented, the prior restraint question in the petition is wholly abstract and hypothetical, as the phrasing of petitioner's own first question confirms. Even apart from the lack of finality and mootness, the prior restraint question posed by petitioner lacks the concreteness that should exist before the Court undertakes to decide such an important constitutional issue. Moreover, the facts of this case – which is the third of four similar ones in which TROs were granted and then stayed by this Court – are surely sufficiently unique as to make this a particularly poor vehicle for sorting out the complex legal issues in this area.[2]

4. The petition presents a second question – whether the Mississippi Supreme Court's decision that petitioner had waived its right to appeal violates its constitutional rights does not provide a basis for review either. In part, because of the unique procedural posture of this case, in which the Chamber deliberately by-passed

---

[2] Even if the Court were to consider the propriety of the TRO here, it might never reach the prior restraint issue because the TRO was issued without notice to Chamber and hence may have violated due process. *See Carroll v. Princess Anne*, 393 U.S. 175, 180 (1968) (reversing injunction for lack of notice and declining to address the "thorny problem" of whether it was justified under the facts).

the Mississippi Supreme Court in seeking a stay, the ruling below may well be applicable only to the Chamber in this case, but not in cases where it sought and was denied a stay in the Mississippi Supreme Court. In that circumstance, the decision may well constitute an adequate state ground for decision, and hence review in this Court would not be proper.

In any event, the second question has no independent leg on which to stand; it does not claim any legal right, but is offered essentially as a response to an anticipated defense. Thus, if it had any merit, it would do no more than remove a barrier to review by this Court and would not be an independent reason to grant the petition. Therefore, assuming that it too is not moot, it provides no reason for this Court to grant review.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

Thomas Tucker Buchanan
P.O. Box 4326
Laurel, Mississippi 39441-4326
(601) 649.8000

Attorney for Respondent,
Honorable Billy Joe Landrum

Supreme Court, U.S.
FILED
SEP 3 2002
CLERK

(3)

No. 01-1649

In the
Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA
Petitioner,

v.

BILLY JOE LANDRUM,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS TUCKER BUCHANAN
Counsel of Record

531 North 5th Avenue
P.O. Box 4326
Laurel, Mississippi 39441

Counsel for Respondent

BEST AVAILABLE COPY

TABLE OF CONTENTS

Table of Contents	i
Table of Cited Authorities	ii
Introduction	1
Statement of the Case	3
Reasons for Denying the Writ	8
Conclusion	16

TABLE OF CITED AUTHORITIES

Page

Cases:

Buckley v. Valeo, 424 U.S. 1 (1976) 12

Golden v. Zwickler, 394 U.S. 103, 109 (1969) 10

Jefferson v. City of Tarrant, Alabama, 522 U.S. 75, 81 (1997) 8

Norman v. Reed, 502 U.S. 279, 288 (1992) 11

Oil Workers Unions v. Missouri, 361 U.S. 363, 368-369, 371 (1960) 10

Weinstein v. Bradford, 423 U.S. 147, 149 (1975) 11

Statutes:

28 U.S.C. § 1257 1,8

INTRODUCTION

Although the petition purports to present a question of some importance as to the circumstances in which a court is permitted by the First Amendment to enjoin the massive expenditure of money designed to affect the outcome of a state election in violation of state law, this case is not an appropriate one to decide that question for a series of interrelated reasons. First, the appeal is from a decision of a state court, and there is no final judgment in the case as required by 28 U.S.C. § 1257. Second, the injunction from which the appeal arises has been dissolved, and there is no reasonable likelihood that a similar dispute will arise involving these parties that would prevent the case from being moot. Third, the substantive legal issues raised by the injunction are now pending before this Court in a petition for writ of certiorari by the State of Mississippi in response to the denial by the 5th Circuit Court of Appeals for a rehearing en banc, and are likely to be resolved in a way that will make it

clear either that petitioner can or cannot make the kind of expenditures at issue in this case, and so the case is also unlikely to arise again with any other party besides this respondent.

Fourth, the factual record in this case is extremely sparse, and hence this Court would be deciding the prior restraint question in an almost hypothetical manner. Fifth, the procedural posture of this case as the third of four cases in which temporary restraining orders were granted shortly before an election, and then traveled different appellate paths before the orders were dissolved, makes this a particularly inappropriate vehicle for passing on the questions presented. To the extent that the Court believes that the petition presents recurring issues of importance, they can be dealt with much more appropriately in another case where the myriad problems involved here are absent.

STATEMENT OF THE CASE

In general, the petition contains most of the facts necessary for the Court to decide whether to grant review. However, the presentation tends to gloss over those aspects of the record that point out why review is inappropriate. Accordingly, respondent will briefly summarize the relevant facts and proceedings.

The petitioner Chamber of Commerce of the United States began running frequent television advertisements in favor of certain Mississippi Supreme Court candidates on or about October 17, 2000, three weeks before the election for each of the four seats on the Court that were being contested. Six days later, the Chamber filed a declaratory judgment action against the State of Mississippi and certain state officials in the United States District Court for the Southern District of Mississippi. After an expedited hearing requested by the Chamber, that Court ruled on Thursday, November 2, five days before the election, that the Chamber's

advertisements were not immune on First Amendment grounds from Mississippi's campaign finance laws.

The following day, November 3, the Hon. Frank Vollor, who was the opponent of Justice Jim Smith, sought and obtained a temporary restraining order in the Chancery Court of Hinds County, Mississippi, to prohibit the Chamber from running further advertisements in support of Justice Smith in violation of Mississippi law. The next day, November 4, a similar TRO was issued by the Chancery Court of Harrison County, at the request of Justice Oliver Diaz, who was running against the Hon. Keith Starrett (supported by the Chamber), and the respondent, the Hon. Billy Joe Landrum. On the following day, November 5, a similar TRO was sought by respondent and granted by the Chancery Court of Jones County in that same election. That order stated that, because of insufficient time, it was being granted without notice to the Chamber. And on November 6, a further TRO was issued against the Chamber at the behest

of a Mississippi citizen who claimed that his rights were being infringed by the Chamber's illegal expenditures. All of these TROs, including the one that is the subject of this petition, were stayed on November 6 by Justice Scalia, and the Chamber resumed broadcasting them and continued to do so through the November 21st runoff election.

This petition challenges the legality of one of the four TROs granted by the Mississippi Chancery Court – that issued against respondent Landrum. When this case was filed, respondent was a candidate for the Mississippi Supreme Court, but he lost in that election, and that election is over. Respondent is now, and has been for 16 years a Circuit Court judge in Mississippi and for 12 years before that he was a county judge. He is now 69 years of age, and he has authorized counsel to represent to this Court that he is highly unlikely to seek election to any other court (he is unopposed in his Circuit Court race for re-election this year).

Despite the obvious problems of mootness, petitioner appealed the legality of the stayed and now dissolved TRO for a since completed election to the Mississippi Supreme Court, which rejected the appeal because the Chamber chose to by-pass the Mississippi Supreme Court and proceed directly to this Court. The Mississippi Supreme Court did not dismiss the case entirely or affirm the judgment below. Instead, it remanded for further proceedings consistent with its ruling. Respondent then moved to file an amended complaint, eliminating his claim for injunctive relief, and in its place, seeking money damages against the Chamber for the harm it caused him through its illegal campaign expenditures and related unlawful activities.

Then, seventeen months after the case was brought, the Chamber tardily removed the case to federal court on diversity of citizenship grounds. Although respondent was prepared to move to remand, the district court immediately stayed all proceedings (including any motions to remand),

pending the outcome of the petition for certiorari and the proceedings in the Fifth Circuit described in the petition and discussed below.

Throughout this case and the related ones, the Chamber has contended that it had not violated Mississippi law because it had not engaged in express advocacy as a matter of Mississippi law and because, in any event, the First Amendment permits it to spend money for the kind of advertisements that it was making, even if state law prohibits it. The petition is quite adamant in disclaiming any desire to have those issues resolved in this case because they are the subject of the Chamber's own lawsuit in federal court. Indeed, it has prevailed before a panel of the Fifth Circuit, and the petition for rehearing by the Mississippi Attorney General and others has been denied, but is on appeal to this Court by a petition for writ of certiorari. As the parties have recognized in agreeing to a stay of the removed claim in this

case, the outcome of the Chamber's federal case will profoundly impact the remaining claim for damages.

But the Chamber's federal case is also important to this case because since it prevailed in the Fifth Circuit, and if it prevails in this Court, under either state or federal law, it will no longer have any need to fear any state court injunctions of the kind that were issued here, from respondent or from anyone else.

REASONS FOR DENYING THE WRIT

1. There is no final judgment in this case as required by 28 U.S.C. § 1257 and decisions of this Court such as *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81 (1997). Although the issue of the TRO is no longer in the case, the case is not over because the Mississippi Supreme Court ordered a remand. Then, on remand, respondent moved to amend his complaint, and the Chancery Court permitted him to do so. Petitioner then removed the amended

complaint to the federal court, relying on the same diversity of citizenship grounds that have always existed (assuming the Chamber does not claim that the value of the original controversy over its massive television advertisement campaign was less than $75,000).[1] Because there is a stay entered by the district court, respondent has not filed a motion to remand, but even if that motion should be denied, the case would still be pending in federal court. Whether a certiorari petition from a federal district court to this Court might have any basis in any case (and none has been filed in this one), there would be no extraordinary reason for this Court to accept an interlocutory review from a district court where there is no injunction pending and none ever likely to be granted in this case.

2. Even if there were a final judgment, the claim for injunctive relief in this case is clearly moot as between these parties. As noted above, it is highly unlikely that respondent

---

[1] See "Debate Over Tort Reform Ongoing", *The Clarion-Ledger*, June 19, 2001, pp 1a, 4a (reporting that Chamber spent $958,000 on Mississippi Supreme Court elections).

will seek election as a Justice of the Mississippi Supreme Court again, given his age and his status as a sitting judge. He is currently running unopposed for Circuit Court judge, and there is no claim by the Chamber that it will make any expenditures against him in that race that might conceivably cause him to seek injunctive relief of the kind that he sought here. Therefore, he has no current stake in the debate over the legality of the TRO, and hence there is no Article III case or controversy over it. Any claim by the Chamber that it will suffer future harm is "wholly conjectural." *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). *See also, Oil Workers Unions v. Missouri*, 361 U.S. 363, 368-369, 371 (1960) (where an allegedly unconstitutional injunction against a labor strike had expired by its own terms, the case was moot despite the possibility of future injunctions against the labor unions that were involved). As a practical matter, there is "no reasonable expectation that the same complaining party [will] be subjected to the same action again," *Weinstein v.*

Bradford, 423 U.S. 147, 149 (1975), and certainly not at the hands of the appellee here. *Cf. Norman v. Reed*, 502 U.S. 279, 288 (1992) (case not moot because "[t]here would be every reason to expect *the same parties* to generate a similar, future controversy").

There is another reason why, even if the Chamber expected to run similar ads against some other judicial candidate in the future, there is no reasonable likelihood that a case remotely similar to this one would arise. The principal substantive issue on which the parties differed in all four TRO cases is whether, as a matter first of state law and then of First Amendment law, Mississippi could forbid the Chamber from running the kind of ads that it ran in connection with the 2000 elections for Justices of the Mississippi Supreme Court. Those issues are now before this Court by Mississippi's appeal of the Fifth Circuit's denial of the petition for rehearing en banc, and perhaps this Court will resolve them in a way that everyone will know whether the

Chamber can or can not run similar ads in the future. As it stands currently, the Fifth Circuit has found in favor of the Chamber. But whatever the answer, everyone will comply with the law, and there will be no similar lawsuit to this one, further underscoring why this case is moot.

3. Respondent does not disagree that the standard for enjoining political speech places a very heavy burden on the party seeking the injunction because of this Court's prior restraint rulings. Respondent also recognizes that expenditures related to elections are entitled to First Amendment protection, consistent with this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), and the cases that have followed it. But that does not neuter every court from the power to enjoin the expenditure of money for election related purposes, simply because the party seeking to make the expenditure claimed First Amendment status for it.

For example, suppose in this case the Chamber (or a non-U.S. corporation) had sought to run ads that clearly

constituted express advocacy, either because it did not fear criminal prosecution or was willing to pay the fine as a cost of obtaining a Mississippi Supreme Court to its liking. Assume further that under state law, once an election is concluded, the courts would have no power to overturn it, even where the claim was that massive illegal expenditures resulted in a very close victory for one candidate over another. A candidate seeking an injunction in such a situation would bear a heavy burden, but there is no decision of this Court that would clearly and absolutely foreclose the possibility of such relief, and indeed even the petition recognized (18-19) that the law against prior restraints is not absolute.

Yet the petition asks this Court to rule on the scope of the prior restraint doctrine in a context totally devoid of facts (because the case came up on a TRO) and in which the key legal issues noted above are currently unresolved, but will be resolved in the near future. Thus, as presented, the prior

restraint question in the petition is wholly abstract and hypothetical, as the phrasing of petitioner's own first question confirms. Even apart from the lack of finality and mootness, the prior restraint question posed by petitioner lacks the concreteness that should exist before the Court undertakes to decide such an important constitutional issue. Moreover, the facts of this case – which is the third of four similar ones in which TROs were granted and then stayed by this Court – are surely sufficiently unique as to make this a particularly poor vehicle for sorting out the complex legal issues in this area.[2]

4. The petition presents a second question – whether the Mississippi Supreme Court's decision that petitioner had waived its right to appeal violates its constitutional rights does not provide a basis for review either. In part, because of

---

[2] Even if the Court were to consider the propriety of the TRO here, it might never reach the prior restraint issue because the TRO was issued without notice to Chamber and hence may have violated due process. *See Carroll v. Princess Anne*, 393 U.S. 175, 180 (1968) (reversing injunction for lack of notice and declining to address the "thorny problem" of whether it was justified under the facts).

the unique procedural posture of this case, in which the Chamber deliberately by-passed the Mississippi Supreme Court in seeking a stay, the ruling below may well be applicable only to the Chamber in this case, but not in cases where it sought and was denied a stay in the Mississippi Supreme Court. In that circumstance, the decision may well constitute an adequate state ground for decision, and hence review in this Court would not be proper.

In any event, the second question has no independent leg on which to stand; it does not claim any legal right, but is offered essentially as a response to an anticipated defense. Thus, if it had any merit, it would do no more than remove a barrier to review by this Court and would not be an independent reason to grant the petition. Therefore, assuming that it too is not moot, it provides no reason for this Court to grant review.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

Thomas Tucker Buchanan
P.O. Box 4326
Laurel, Mississippi 39441-4326
(601) 649.8000

Attorney for Respondent,
Honorable Billy Joe Landrum

(4)

Supreme Court, U.S.
FILED
SEP 9 2002
CLERK

No. 01-1649

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JOE LANDRUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

MICHAEL B. WALLACE
PHELPS DUNBAR, L.L.P.
200 S. Lamar Street
Suite 500, Skytel Centre
Jackson, MS 39225

Counsel for Petitioner

Of counsel:

STEPHEN A. BOKAT
General Counsel
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, DC 20062

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

12pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
REPLY ARGUMENT	3
Respondent's "No Final Judgment" Argument Lacks Merit	3
The Chamber's Questions Are Not Moot	4
The Questions Posed Do Not Lack Sufficient "Concreteness"	6
The Waiver Issue Does Involve An Important Claim of Right	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

American Radio Association. v. Mobile Steamship Association, Inc., 419 U.S. 215 (1974) 3

Buckley v. Valeo, 424 U.S. 1 (1976) 5

Earls v. Board of Education of Tecumseh Public School District, 242 F.3d 1264 (10th Cir. 2001), *cert. granted, Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 509 (2001) 3

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 5

Gore v. Harris, 772 So.2d 1243 (Fla. 2000), *cert. granted, Bush v. Gore*, 531 U.S. 1046 (2000) 3

Moore v. Chamber of Commerce, 288 F.3d 187 (5th Cir. 2002), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Aug. 26, 2002) (No. 02-305) 5

Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911) 6

STATUTES

28 U.S.C. § 1257 (2000) 3

MISCELLANEOUS

16 Charles Alan Wright, et al., Federal Practice and Procedure § 3922.1 (2d ed. 1992) 3

IN THE

Supreme Court of the United States

No. 01-1649

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JOE LANDRUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent Judge Billy Joe Landrum does not challenge either of the key reasons for granting certiorari presented by the Petitioner Chamber of Commerce of the United States ("Chamber"). First, Respondent does not deny that this case reflects the growing number of state courts that grant ex parte prior restraints on political speech based on claimed violations of the campaign finance laws. Indeed, Respondent's Brief In Opposition ("Opposition") boldly argues (at 9-10) that such restraints are proper simply to avoid possible voter persuasion. Nor does Respondent deny that the Mississippi Supreme Court's novel "waiver" rule—that one

who seeks emergency relief from this Court thereby forfeits its state appellate rights—impermissibly burdens the right of access to federal courts, and is inconsistent with Due Process, the Supremacy Clause and the distinctive role of this Court.

Instead, Respondent argues that this case is not a good vehicle for addressing those important issues. For example, Respondent asserts that the factual record is scanty and that, the election having passed, Respondent has little interest in obtaining additional prior restraints. But ex parte prior restraints almost by definition are based on less than complete facts: that is one important reason they should not be granted to suppress political speech just before an election. And, once an election is over, a plaintiff candidate's interest in speech suppression fades quickly. This case is typical of those that generate the need for review by this Court, and its simple record fully illuminates those issues.

Respondent's references to a recent Fifth Circuit opinion holding that Petitioner's ads did not violate Mississippi's campaign finance law is a red herring. This Petition does not ask this Court to determine the merits of the legal claims on which the ex parte prior restraint was based. Instead, this Petition presents issues that the Fifth Circuit could not and did not address:

1. Did the Chancery Court's summary order against future political speech violate the First and Fourteenth Amendments to the United States Constitution?

2. Did the Mississippi Supreme Court's ruling penalizing Petitioner's exercise of its federal right to Petition this Court by curtailing Petitioner's state appellate rights violate the Supremacy Clause of, and the Fourteenth Amendment to, the United States Constitution?

This Court is unlikely to see a better case for resolving those two important questions.

REPLY ARGUMENT

Respondent's "No Final Judgment" Argument Lacks Merit

Respondent Landrum first asserts that there "is no final judgment as required by 28 U.S.C. § 1257." (Opp'n at 6-7). The Petition explained the Chamber's reasoning as to why the action does meet the requirements of 28 U.S.C. § 1257. (Pet. at 3-4). The Opposition does not dispute any of the facts relied on by the Chamber and does not address the Chamber's related legal arguments. Instead, the Opposition merely describes the history of the case following Mississippi Supreme Court remand, showing that Judge Landrum later amended his complaint to seek monetary damages and that the amended complaint continues to pend at the trial court level. This is undisputed.

Nonetheless, the finality requirements are met for the reasons stated in the Petition. The waiver ruling raised by the Chamber's question number two is a ruling of the Mississippi Supreme Court. The mere fact that the ruling required a remand for further consistent proceedings does not prevent review; that is often the posture of cases arising from U.S. Courts of Appeals or state supreme courts that are accepted by this Court for review on petition for certiorari. *See, e.g.*, *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 242 F.3d 1264, 1279 (10th Cir. 2001), *cert. granted, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 509 (2001); *Gore v. Harris*, 772 So.2d 1243, 1247 (Fla. 2000), *cert. granted, Bush v. Gore*, 531 U.S. 1046 (2000); *Am. Radio Ass'n. v. Mobile Steamship Ass'n, Inc.*, 419 U.S. 215, 217 n.1 (1974). The first Chamber question is sufficiently final to support review as well. The temporary injunctive relief obtained was all the relief that Judge Landrum sought at the time. *See* Pet. at 3 n.2; *see also* 16 Charles Alan Wright, et al., Federal Practice and Procedure, § 3922.1 at 91-93 (2d ed. 1992) (and cases cited therein).

Notably, Judge Landrum moved to dismiss the Chamber's appeal of the TRO on lack-of-finality grounds, and the Mississippi Supreme Court denied that motion. (Pet. App. at 89a).

The Chamber's Questions Are Not Moot

Respondent Judge Landrum argues that the prior restraint question raised by the Chamber is moot. He makes no such argument as to the waiver issue. His argument on the prior restraint question first contends that the speech which prompted Judge Landrum to seek the TRO in this case will not be repeated, because he will not run for the Mississippi Supreme Court again.[1] Judge Landrum goes on to represent that he is running for re-election to the Circuit Court and "there is no claim by the Chamber that it will make any expenditures against him in the race that might conceivably cause him to seek injunctive relief of the kind he sought here." (Opp'n at 8). This plainly suggests that, if the Chamber were to run ads that displeased Judge Landrum, he might seek injunctive relief against them.

Respondent also argues that "there is no reasonable likelihood that a case remotely similar to this one would arise," (Opp'n at 9) because "whether the Chamber can or can not run similar ads in the future" will be clarified through the

---

[1] Respondent's statement that "he has no current stake in the debate over the legality of the TRO" (Opp'n at 8) is belied by the fact that he currently has an amended complaint for a permanent injunction against the Chamber pending in federal district court (Pet. App. at 166a-167a). Another instance in which the Respondent's presentation is less than forthcoming is his statement that the Chamber removed the case to federal court by "relying on the same diversity of citizenship grounds that have always existed" (Opp'n at 7). However, diversity only existed after Respondent dismissed several Mississippi television stations in his amended complaint (Pet. App. at 164a) that were included in his original complaint (Pet. App. at 53a).

Moore v. Chamber of Commerce litigation [2] and "everyone will comply with the law" (Opp'n at 9).[3] That litigation will resolve whether the Chamber advertisements run in 2000 in Mississippi merit First Amendment protection under the express advocacy standard established by *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). However, it always will be possible for partisans to contend that future ads constitute express advocacy or fail to meet whatever other standard may then define the outer limit of First Amendment protection of political speech from state regulation.

Unless this Court makes clear that TROs and other forms of summary injunctive relief are *not* appropriate remedies for redressing objections to political ads, the Chamber surely will face similar cases in the future. Nowhere does Respondent suggest his acceptance of the principle that such TROs or other similar prior restraints are not appropriate remedies for courts to employ when the ad appears to involve express advocacy or when that issue is genuinely disputed.[4] Consequently, this presents a classic example of a case that is

---

[2] *Moore v. Chamber of Commerce*, 288 F.3d 187 (5th Cir. 2002), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Aug. 26, 2002) (No. 02-305). The Chamber opposes this Court's taking review in that case, because the Fifth Circuit correctly understood and applied the express advocacy standard.

[3] Such guidance might also have been provided by the Mississippi Supreme Court in the present case, but for its waiver ruling that is challenged by the Chamber's Petition, or in a companion appeal of a similar prior restraint that the Mississippi Supreme Court summarily dismissed by Order dated July 26, 2002.

[4] The Chamber submits that candidates will always desire summary injunctive relief from political speech that they perceive to be harmful to their interests. However, there is hope that, following appropriate guidance from this Court, the lower courts will resist yielding to such candidate requests.

"capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), and, therefore, is not moot.

The Questions Posed Do Not Lack Sufficient "Concreteness"

Respondent also contends that the Chamber seeks review "in a context totally devoid of facts (because the case came up on a TRO)" (Opp'n at 10-11) and the "prior restraint question posed by petitioner lacks the concreteness that should exist before the Court undertakes to decide such an important constitutional issue" (Opp'n at 11). The absence of a more developed record is not a valid reason for declining to take review here. Prior restraints on political speech are typically entered on the basis of a scant factual record and minimal judicial consideration. Indeed, the present case may involve a fuller record than most. Here, the Chamber had brought in another court a declaratory judgment action against the Mississippi Attorney General. That litigation produced a decision and extensive opinion by U.S. District Judge Wingate that the ad to which Judge Landrum objected constituted express advocacy, and, therefore, was subject to the Mississippi campaign finance disclosure statutes. Respondent Judge Landrum's request for injunctive relief relied exclusively on Judge Wingate's opinion and Judge Landrum's perception that the ad was injurious to his candidacy. (Pet. App. at 54a). If, as the Chamber contends, the First Amendment protects the Chamber from prior restraints in those circumstances, then the Chamber and other political speakers will also be protected in the more common circumstance where there has been even less judicial examination of the ad.[5]

---

[5] The Chamber's position is that the First Amendment protects against courts entering injunctive prior restraints even where an ad does constitute express advocacy.

Respondent does not make clear what fact he believes to be missing from the record that makes this case inappropriate for a writ of certiorari. He poses a hypothetical, however, that may suggest his thinking. He argues that there is "no decision of this Court that would clearly and absolutely foreclose" injunctive relief where "massive illegal expenditures resulted in a very close victory for one candidate over another" (Opp'n at 10).[6] This case does not present that situation,[7] and the Chamber does not seek through this Petition a ruling that purports to address unrelated hypothetical situations. The Chamber seeks only a determination as to the lawfulness of prior restraint in the circumstances of this case. Nevertheless, given the increasing occurrence of prior restraints on political speech (Pet. at 17-18), the Court could grant the writ and address the concerns inherent in Respondent's hypothetical.

The Waiver Issue Does Involve An Important Claim of Right

Respondent's final contention is that the Chamber's second question "does not provide a basis for review." (Opp'n at 11). First, Respondent speculates that the new waiver rule may have been imposed only because "the Chamber deliberately by-passed the Mississippi Supreme Court in seeking a stay" (Opp'n at 11-12), and the rule "may well be applicable only to the Chamber in this case" (Opp'n at 12).

---

[6] It would seem unlikely that any candidate could establish prior to the election that ads which had, or had not yet, been run actually would change the outcome of the election.

[7] Judge Starrett, the candidate referred to favorably in the Chamber's ad that Respondent requested be restrained, lost the election. Moreover, the Chamber did not make "massive illegal expenditures." Judge Wingate's decision found only that the ads were subject to the Mississippi reporting statute. In that declaratory judgment action, no party alleged that the Chamber expenditures were unlawful under Mississippi law, and Judge Wingate made no finding that they were.

That interpretation, which is narrower than the language of the Mississippi Supreme Court's Order,[8] would not render the waiver rule unimportant. So far, this Court is the only Court in which the Chamber has been able to secure timely judicial relief from prior restraints on Chamber political speech.[9] Absent effective guidance to the lower courts, the Chamber may well have to invoke the same procedure in the future.

Respondent also asserts that the Chamber's objection to the waiver rule "does not claim any legal right" (Opp'n at 12).[10] That assertion is erroneous. The Chamber is seeking to maintain the right to have its merits appeal to the Mississippi Supreme Court decided on its merits. Ruling on the arguments briefed by the parties could have vindicated the Chamber rights asserted there. The right to appeal within the state court system is very important to the Chamber, like other litigants. The Chamber's challenge to the waiver rule seeks directly to protect that right.

---

[8] The Order states: "After due consideration, we find that the Chamber waived its right to appeal this case to this Court when it chose to file a motion to stay state court proceedings with the United States Supreme Court." (Pet. App. at 1a).

[9] As noted in the Petition (at 8), the Mississippi Supreme Court had denied, three days earlier, the stay application made by the Chamber with respect to another prior restraint order that relied on Judge Wingate's decision (Pet. App. at 49a). It can hardly be argued, as Respondent does (at 11-12), that the Chamber "deliberately by-passed the Mississippi Supreme Court in seeking a stay" of the prior restraint that is the subject of this Petition. It would have been futile for the Chamber to wait for the Mississippi Supreme Court to again deny an identical stay application involving a different plaintiff.

[10] The Opposition also suggests that the waiver "may well constitute an adequate state ground for decision." (Opp'n at 12). However, the Opposition notes no prior source of that rule in Mississippi law and presents no rebuttal to the Petition's demonstration that such a state court rule would run contrary to this Court's Supremacy Clause and Due Process decisions. (Pet. at 19-21.)

CONCLUSION

For the reasons discussed above and demonstrated in the Chamber's Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

MICHAEL B. WALLACE
PHELPS DUNBAR, L.L.P.
200 S. Lamar Street
Suite 500, Skytel Centre
Jackson, MS 39225

Counsel for Petitioner

Of counsel:

STEPHEN A. BOKAT
General Counsel
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, DC 20062